

Withering Doctrine of Ex Parte Young

Nathan C. Thomas

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NOTE

THE WITHERING DOCTRINE OF *EX PARTE YOUNG*

Nathan C. Thomas†

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INTRODUCTION

"For the past century, the most persistent and perplexing issue arising under the Eleventh Amendment has been presented in suits brought against state officers and contested on the ground that such proceedings violated the state's sovereign immunity."¹ The Supreme Court, in its contemporary struggle with federalism and the Eleventh Amendment,² surprisingly addressed the appropriateness of suits against state officials in its recent decision, *Seminole Tribe v. Florida*.³

Following the *Seminole* decision's primary discussion of congressional abrogation,⁴ the Court introduced a simple yet troubling limitation on the *Ex parte Young*⁵ doctrine.⁶ Some commentators think the *Young* issue is of little concern,⁷ but a closer analysis of the issue reveals the difficulties that the *Seminole* and *Idaho v. Coeur d'Alene Tribe*⁸

¹ CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 110 (1972).

² See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-25, at 173 (2d ed. 1988) ("The eleventh amendment lies at the center of the tension between state sovereign immunity and the desire to have in place mechanisms for the effective vindication of federal rights.").

³ 517 U.S. 44 (1996). The *Seminole* Court rendered two holdings that affect Eleventh Amendment jurisdiction. First, the Court limited Congress's ability to abrogate state sovereign immunity. *Id.* at 72-73. Second, *Seminole* narrowed the ability of individuals to sue state officials. *Id.* at 76. This Note will focus on the latter holding. For a detailed discussion of *Seminole*'s congressional abrogation ruling, see Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996) and Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102 (1996).

⁴ *Seminole*, 517 U.S. at 55-73; see also *supra* note 3 (discussing *Seminole*'s limitations on Eleventh Amendment jurisdiction).

⁵ 209 U.S. 123 (1908).

⁶ *Id.* at 155-56 (granting federal court jurisdiction over a suit, in spite of the Eleventh Amendment, in which an individual sought injunctive relief against a state official). *Seminole* frustrates an individual's ability to gain access to a federal court "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, [because] a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole*, 517 U.S. at 74.

⁷ See David P. Currie, *Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 551 (1997) ("*Seminole Tribe* is no threat to *Ex parte Young* as a crucial remedy for the protection of constitutional rights."); Monaghan, *supra* note 3, at 128 ("*Seminole Tribe* will have no significant impact on the actual authority of federal courts to enforce . . . federal laws prospectively against states in suits by private persons.").

⁸ 117 S. Ct. 2028 (1997).

decisions could create in a number of areas, including environmental law,⁹ bankruptcy,¹⁰ antitrust,¹¹ and civil rights.¹²

The Eleventh Amendment emerged in 1798 to assure the proper respect for state sovereign immunity under the United States Constitution.¹³ The courts' interpretation of this Amendment has effectively and consistently ensured immunity when suits are against the *states themselves*; however, the federal judiciary continues to alter the applicability of sovereign immunity when individuals bring suits against *state officials*.¹⁴

⁹ See, e.g., Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 288-94 (1996) (arguing that Congress did not intend the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to be an exclusive source of remedies, and that courts should supplement the remedies available under CERCLA); Courtney E. Flora, Chapter, *An Inapt Fiction: The Use of the Ex parte Young Doctrine for Environmental Citizen Suits Against States After Seminole Tribe*, 27 ENVTL. L. 935, 948-49 (1997) (recognizing that after *Seminole* "Congress no longer has power to abrogate sovereign immunity under the Commerce Clause, [consequently,] *Ex parte Young* is the sole means of recourse for citizens against states that violate federal environmental laws").

¹⁰ See S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 213-15 (1996); Joseph F. Riga, *State Immunity in Bankruptcy After Seminole Tribe v. Florida*, 28 SETON HALL L. REV. 29, 51, 67 (1997) (maintaining that *Seminole* "sounded the death knell for section 106(a)" of the Bankruptcy Code, and questioning "[w]hether *Young*-type suits in bankruptcy will survive the case-by-case balancing test of *Coeur d'Alene*").

¹¹ See, e.g., Susan Beth Farmer, *Balancing State Sovereignty and Competition: An Analysis of the Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine*, 42 VILL. L. REV. 111, 182-88 (1997); Michael J. Kaufman, *Mending the Weathered Jurisdictional Fences in the Supreme Court's Securities Fraud Decisions*, 49 SMU L. REV. 159, 196 (1996) (referencing the remedies available under federal antitrust laws).

¹² See PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 185 (3d ed. Supp. 1997) ("Virtually the entire class of modern civil rights litigation might be barred by an expansive reading of the immunity of states from suit in federal court."); see also John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 59 (1998) ("*Ex parte Young* routinely allows civil rights plaintiffs to evade the Eleventh Amendment . . ."). But see Flora, *supra* note 9, at 960 (arguing that today "[c]ivil rights legislation is relatively secure due to the Court's continued allowance of congressional abrogation under the Fourteenth Amendment").

¹³ See JACOBS, *supra* note 1, at 64-74. The Supreme Court has adopted this historical perspective of the Eleventh Amendment. *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15-16 (1890). Some commentators, however, have found "little historical support . . . for the Court's controversial assertion . . . that the Eleventh Amendment restored a broad principle of state sovereign immunity" understood to have been implicit in the Constitution. James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1369-70 (1998). Professor Pfander argues that the Eleventh Amendment was merely an "explanatory amendment" of Article III, *id.* at 1323-52, and that it "has virtually no modern role to play in defining the power of the federal courts to hear claims against the states as parties defendant." *Id.* at 1362 n.415.

¹⁴ When a litigant names a state as a party to a suit, the Eleventh Amendment will generally preclude the action with respect to the state. See *infra* Part I.A.1. However, the court must conduct a different inquiry when a state official, as opposed to the State itself, is the party named in a suit. See *infra* Part I.A.2.

The doctrine of *Ex parte Young* embodies the judicially created approach for determining whether sovereign immunity extends to suits nominally against state officials.¹⁵ The viability of the *Ex parte Young* approach remained settled¹⁶ until the *Seminole* decision added a new inquiry that narrowed the doctrine's application.¹⁷ Congress and the federal judiciary have had almost ninety years to reflect on the Court's decision in *Ex parte Young*. During that time, the law has never contemplated the existence of a statutory remedy as an indication that *Ex parte Young* does not apply. Moreover, *Coeur d'Alene's* intimation of a new approach in *Ex parte Young* cases further limits the effectiveness of the doctrine's protection of federal rights.

Part I of this Note details the doctrine of Eleventh Amendment sovereign immunity, focusing on the *Young* exception that is applicable when the defendant is a state official.¹⁸ This Part also explores the judicially created cause of action available in suits against federal officials that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*¹⁹ and its progeny provide. Part II discusses the Supreme Court's decisions in *Seminole* and *Coeur d'Alene*. Part III argues that the federalist policies underlying the Eleventh Amendment and *Young*, as well as the precedent and rationale on which the Court relies in its recent decisions, do not support a new approach for finding otherwise culpable state officials immune from suit under the guise of state sovereign immunity. Additionally, this Part suggests several interpretations of these decisions and discusses their potential to save the *Ex parte Young* doctrine from further retrenchment. This Note concludes that the Court should neither expand state sovereign immunity further by infringing on individual rights, nor should it add any additional limitations to the *Ex parte Young* doctrine.

¹⁵ Individuals may gain federal jurisdiction in a suit against a state official under *Young* when the suit seeks prospective relief. See *infra* Part I.A.2.

¹⁶ The *Ex parte Young* doctrine has not survived without alteration. Since the Court handed down its decision in 1908, it has established several limitations on suits in federal court against state officers. Limiting *Young*, the Court held that federal courts may not grant retroactive relief. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974); *infra* notes 68-85 and accompanying text. Additionally, a federal court may not enjoin state officers from violating state law. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984). Each of these limitations is necessary to ensure that the *Ex parte Young* doctrine's sole purpose is to protect the supremacy of federal law. See *infra* Part III.A.

¹⁷ See *supra* note 6.

¹⁸ *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

¹⁹ 403 U.S. 388 (1971); see *infra* Part I.B.

I
BACKGROUND

A. Suits Against State Officials

1. *The Eleventh Amendment Prevents Suits Against States*

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."²⁰

History suggests that Congress fashioned the Eleventh Amendment in response to a desire to preserve state sovereign immunity.²¹ Prior to the Eleventh Amendment's enactment, courts followed a literal interpretation of Article III of the United States Constitution, which provides federal courts with the authority to adjudicate "[c]ontroversies . . . between a State and Citizens of another State."²² Justice Iredell in *Chisholm v. Georgia*,²³ relying on the explicit language of Article III, expressed the federal judiciary's rejection of state sovereign immunity. The Iredell majority held that a federal court's jurisdiction over a suit filed against a state existed regardless of a state's consent to suit.²⁴ Subsequently, the states ratified the Eleventh Amendment to overturn *Chisholm*.²⁵

The meaning and history of the Eleventh Amendment, however, are the subject of much debate.²⁶ Today, there are two general ap-

²⁰ U.S. CONST. amend. XI.

²¹ See *supra* note 13 and accompanying text. More specifically, the Eleventh Amendment sought to prevent "private actions compelling states to pay their war debts." Hovenkamp, *supra* note 3, at 2240; see Joseph J. Weissman, Note, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 GEO. WASH. L. REV. 123, 142-43 (1993).

²² U.S. CONST. art. III, § 2; see John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1899 (1983) (suggesting that evidence supporting state sovereign immunity at the time of the Constitution's ratification was weak, but that "compelling evidence suggests that article III was understood . . . to mean exactly what it says").

²³ 2 U.S. (2 Dall.) 419 (1793) (opinion of Iredell, J.).

²⁴ *Id.* at 431.

²⁵ The *Chisholm* decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934); see also Weissman, *supra* note 21, at 143 ("The decision in *Chisholm* alarmed the states."). But see Gibbons, *supra* note 22, at 1926-27 (arguing that "Congress's initial reaction to the *Chisholm* decision hardly demonstrates the sort of outrage so central to the profound shock thesis," and concluding that "Congress did not regard *Chisholm* . . . as a matter of great moment").

²⁶ See Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 61 (1989); see also Weissman, *supra* note 21, at 143 ("Although the Eleventh Amendment was intended to 'reverse' *Chisholm*, it does not necessarily follow that the Framers of the Eleventh Amendment meant to create a blanket of state sovereignty." (footnote omitted)).

proaches to the interpretation of the Eleventh Amendment. First, the courts have adopted a conventional view²⁷ that does not interpret literally all aspects of the Eleventh Amendment.²⁸ The clear language of the Amendment prohibits suits that citizens of another state or foreign citizens have brought against a state.²⁹

In practice, courts have embraced a much more expansive interpretation. The Court in *Hans v. Louisiana*³⁰ extended a state's Eleventh Amendment protection to bar suits that one of its own citizens can bring.³¹ The issue before the *Hans* Court was whether a citizen of Louisiana could sue the state of Louisiana on a federal question.³² *Hans* "expanded the scope of the [Eleventh] Amendment to include federal question cases" that a state's own citizens can bring.³³ The Court viewed this extension beyond the Amendment's explicit lan-

²⁷ See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1342 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1372-80 (1989); Massey, *supra* note 26, at 61-64, 67-72.

²⁸ See TRIBE, *supra* note 2, § 3-25, at 175 (explaining that cases contemplating Eleventh Amendment issues have "focused not on the language of the eleventh amendment, but on the concept of sovereign immunity of which it is a reminder and 'exemplification'" (footnote omitted)); see also Massey, *supra* note 26, at 62 (explaining "that the [eleventh] amendment made constitutional an original understanding that the states were immune from private suits in the federal courts").

²⁹ See *supra* text accompanying note 20.

³⁰ 134 U.S. 1 (1890) (A Louisiana citizen brought suit against the state of Louisiana to recover unpaid interest from state-issued bonds.).

³¹ *Id.* at 14-15, 20 (finding the state immune from suit under the principle of sovereign immunity).

³² *Hans* brought suit under the Contracts Clause, art. I, § 10, of the U.S. Constitution. See *id.* at 3.

³³ Hovenkamp, *supra* note 3, at 2242. The *Hans* Court stated that it was "clearly established" that the Eleventh Amendment barred federal question suits that noncitizens bring against a state, see Monaghan, *supra* note 3, at 105 & n.25, and observed that it would be "anomalous" to protect a state from suits its own citizens bring while failing to protect that state from suits that citizens of other states bring. *Hans*, 134 U.S. at 10. In so noting, the Court recognized that its interpretation of the Eleventh Amendment went beyond the language of the Amendment and instead adopted notions of state sovereign immunity inherent in Article III. See Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 497 & nn.16-17 (1997). The *Hans* decision interpreted the Eleventh Amendment to bar a suit against a state regardless of whether the plaintiff brought suit under diversity or federal question jurisdiction. See LOW & JEFFRIES, *supra* note 12, at 184 (observing that the *Hans* Court "seemed to read the amendment as evidencing a comprehensive policy of state sovereign immunity in the federal courts"); *infra* notes 35-38 and accompanying text (discussing the conventional view of the Eleventh Amendment).

Under a more narrow reading of *Hans*, courts view the Eleventh Amendment as only barring diversity suits. See LOW & JEFFRIES, *supra* note 12, at 191. This interpretation means that the Eleventh Amendment would permit suits involving federal issues, see *id.* at 192, but would not permit suits against a state on state issues, because Article III does not reach state law questions. See Jackson, *supra*, at 500-01 & nn.29-30; *infra* notes 39-43 and accompanying text (discussing the revisionist view of the Eleventh Amendment).

guage as necessary to uphold the sovereign immunity protections that favor the states.³⁴

The *Hans* interpretation of the Eleventh Amendment is the foundation of the conventional view.³⁵ This interpretation bars federal courts from all suits against states irrespective of the citizenship of the claimant or the nature of the claim—state or federal law—on which federal jurisdiction rests.³⁶ The only exception to this rule, according to the *Hans* Court, occurs when a state, sued by name in federal court, consents to suit.³⁷ Thus, the emphasis of the conventional view is that the Eleventh Amendment “embodies an overarching principle of state sovereign immunity from federal court jurisdiction.”³⁸

However, many scholars endorse a revisionist view that directly conflicts with the conventional view that the majority of today’s Supreme Court holds.³⁹ The revisionists believe that the proper interpretation of the Eleventh Amendment is a literal one, which would allow suits to proceed, regardless of citizenship, whenever jurisdiction rests on the existence of a federal question.⁴⁰ Commentators have

³⁴ *Hans*, 134 U.S. at 14-15. The *Hans* Court confirmed the Eleventh Amendment’s bar of suits that noncitizens of a state bring, *id.* at 10, and then reasoned:

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

Id. at 15; see also Laura M. Herpers, Note, *State Sovereign Immunity: Myth or Reality After Seminole Tribe of Florida v. Florida*, 46 CATH. U. L. REV. 1005, 1021 (1997) (noting that in *Hans*, “the Court held that the spirit, not the letter, of the Amendment preserved state sovereign immunity in all suits brought by citizens against states”).

³⁵ See Massey, *supra* note 26, at 62 (“The conventional doctrine has its modern origin in *Hans* . . .”).

³⁶ See *id.* at 63 (“The conventional view . . . operates to foreclose private claims in federal court against a state by its own citizens that arise under federal statutory or constitutional law.”).

³⁷ See *id.* at 67.

³⁸ *Id.*

³⁹ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473-84 (1987); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pts. 1 & 2), 126 U. PA. L. REV. 515, 1203 (1977-1978); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033-34 (1983); Gibbons, *supra* note 22, at 1890-94; Hovenkamp, *supra* note 3, at 2238-47; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3-4 (1988); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 67-71 (1984).

⁴⁰ See H. Stephen Harris, Jr. & Michael P. Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action over Which the Federal Courts Have Exclusive Jurisdiction*, 37 EMORY L.J. 645, 654-56 (1988).

taken this literal interpretation to mean that the initial intent behind the Eleventh Amendment was to prohibit only diversity suits, and not to reach federal question suits.⁴¹ These academic revisionists believe that the Supreme Court should overturn the *Hans* decision.⁴² The revisionists seek to preserve the "basic structural principles of the original Constitution repudiated by the Court's [Eleventh Amendment] doctrine."⁴³

The conventional view continues to govern; the Supreme Court adheres to the *Hans* interpretation of the Eleventh Amendment, barring a suit whenever "the state is the real, substantial party in interest."⁴⁴ States possess certain attributes of sovereignty from their unique position within the structure of the United States govern-

⁴¹ Proponents of the revisionist view maintain that:

The eleventh amendment's failure to mention in-state citizens suggests that its drafters did not intend it to reach federal question suits

. . . .

The most plausible interpretation of the eleventh amendment thus appears to be that it was designed simply and narrowly to overturn the result the Supreme Court had reached in *Chisholm v. Georgia*. Under this interpretation, the adopters of the amendment were following the traditions of common law lawyers in solving only the problem in front of them by requiring a limiting construction of the state-citizen diversity clause.

Fletcher, *supra* note 39, at 1060-63 (footnote omitted); see also Gibbons, *supra* note 22, at 1934 (noting that the Federalists sought to "leave intact the clauses in article III, section 2 dealing with . . . federal question jurisdiction").

⁴² The revisionists argue that:

[T]he result[] in *Hans* . . . contradict[s] the unambiguous limitations of the Eleventh Amendment's text—a contradiction that suggests the clear error of the Supreme Court's first interpretive premise that the Amendment is in fact concerned with sovereign immunity. If coherence of general sovereign immunity doctrine is achieved only by mangling the Amendment's text, the obvious lesson should be that the Amendment was not designed to embody any such doctrine.

Amar, *supra* note 39, at 1476; see also Harris & Kenny, *supra* note 40, at 656 (explaining that *Hans* "laid the foundation on which . . . the Court's unfortunate eleventh amendment jurisprudence has been built").

Those justices of the Supreme Court who advocate the minority view on the proper interpretation of the Eleventh Amendment believe that *Hans* is misinterpreted, but purport not to want to overrule it. See *Seminole Tribe v. Florida*, 517 U.S. 44, 84 (Stevens, J., dissenting). Several of these justices go even farther and maintain that the Court reached the wrong decision in *Hans*. See *id.* at 130 (Souter, J., dissenting).

⁴³ Amar, *supra* note 39, at 1483. See generally Harris & Kenny, *supra* note 40, at 700 ("[T]he weight of scholarship demonstrates that the historical evidence offers no support for the claim that the eleventh amendment constitutionalized any common law concept of sovereign immunity.").

⁴⁴ *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). The Supreme Court subsequently elaborated:

The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."

Dugan v. Rank, 372 U.S. 609, 620 (1963) (citation omitted).

ment.⁴⁵ Sovereign immunity is one such attribute, enabling a state to function without the disruption of burdensome litigation or judicial interference in policymaking and budgetary decisions.⁴⁶ When states are susceptible to suit, their sovereignty is at risk. Therefore, the Eleventh Amendment confers upon a state the "privilege not to be sued."⁴⁷

But courts also recognize three exceptions to the Eleventh Amendment's prohibition against suing a state. First, a state may consent to suit.⁴⁸ Second, legislation may express a congressional abrogation of state sovereign immunity.⁴⁹ Finally, the *Ex parte Young* doctrine may permit suits against state officials that directly affect state policy and resources.⁵⁰

⁴⁵ Professor Amar explained:

[T]he . . . Constitution preserved the independent lawmaking authority of state governments. The language of the Tenth Amendment simply distilled the underlying structural logic of the original Constitution: Wherever authorized by its own state constitution, a state government can enact any law not inconsistent with the federal Constitution and constitutional federal laws.

Amar, *supra* note 39, at 1466.

⁴⁶ See *In re Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."); see also Melvyn R. Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577, 601 (1994) ("Next to a state's power to determine its own governmental structure and methods of conducting its governmental business, a state's power to raise revenue to finance that business is the prerogative protected by our dual system of government.").

⁴⁷ *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 n.5 (1993); see also Amar, *supra* note 39, at 1473 ("[State s]overeign immunity ousts all federal jurisdiction, whether in law, equity, or admiralty; whether the suit is based on state law, congressional statute, or the Constitution itself; and whether or not state liability would most fully remedy a constitutional wrong perpetrated by the state itself.").

⁴⁸ See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). A state waives Eleventh Amendment protection and consents to suit only when it evidences, with "express language" or such language that leaves no other reasonable interpretation, a desire to abdicate sovereign immunity. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray, McSweeney & Patten v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)).

⁴⁹ See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) ("Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."). After the Court's decision in *Seminole* to overrule *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (expanding Congress's ability to abrogate state sovereign immunity to include acts under the Commerce Clause), see *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996), the only remaining source of congressional abrogation of the Eleventh Amendment is when Congress acts pursuant to its power under "the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

⁵⁰ See Hovenkamp, *supra* note 3, at 2246 ("[W]hen *Hans* gave an expansive reading to the Eleventh Amendment in 1890, the . . . Court felt compelled to create the exception of *Ex parte Young*"); see also *infra* Part I.A.2 (discussing when the *Ex parte Young* doctrine may permit suits against state officials).

2. *The Ex parte Young Doctrine: When Suits Against State Officials Are Permitted Despite the Eleventh Amendment*

The Court in *Ex parte Young* established the third exception to state sovereign immunity under the Eleventh Amendment.⁵¹ Sovereign immunity is unavailable to state officials who act unconstitutionally, even though the state may have authorized their actions.⁵² This limitation on the Eleventh Amendment is necessary to ensure the supremacy of federal law.⁵³

Young began as a suit filed in response to several acts that the Minnesota legislature passed which regulated the maximum rates that railroads could charge for the transportation of passengers and commodities.⁵⁴ These acts set the maximum rates at levels below that which the railroads had been previously charging.⁵⁵ The stockholders of the various railroad companies operating in Minnesota brought an action to enjoin the railroad companies from adopting the new rate schedules and to enjoin both the Railroad and Warehouse Commission and the State Attorney General, Edward T. Young, from enforcing the acts.⁵⁶ The stockholders claimed that the reduction in rates that the acts prescribed deprived them and their companies "of their property without due process of law, and . . . of the equal protection of the laws" in violation of the Fourteenth Amendment.⁵⁷ The circuit court issued a temporary injunction to prevent the Attorney General from levying penalties on the railroad companies for violations of the

⁵¹ *Ex parte Young* unified the law that the Court had applied in similar situations. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 7.5.1, at 390 & n.6 (1994) ("[S]everal earlier cases had held . . . that the Eleventh Amendment did not preclude suits against state officers."). In *In re Ayers*, 123 U.S. 443 (1887), the Court began laying the foundation for the exception that *Young* established. See CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 48, at 307 (5th ed. 1994). The *Ayers* Court held that a suit against a state officer was not barred when it was a suit against the officer as an individual. See *id.* at 307-08. However, the Court also held that when only the individual acting through the state as its officer could perform the action, the suit was against the state, and therefore barred. See *id.* at 308. Following *Ayers*, the law "was clouded" on the issue of whether injunctive relief was available to restrain state officials. See *id.* at 308 & n.10 (citing *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894); *Scott v. Donald*, 165 U.S. 58 (1897); *Sinyth v. Ames*, 169 U.S. 466 (1898); *Prout v. Starr*, 188 U.S. 537 (1903); *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273 (1906); *McNeill v. Southern Ry. Co.*, 202 U.S. 543 (1906)). *Young* settled the obscure state of the law. See *id.* at 308.

⁵² See *Ex parte Young*, 209 U.S. 123, 159-60 (1908). In addition to the suits against state officials permitted under *Young*, sovereign immunity is also unavailable to state officials sued in their individual capacities for damages. See *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974).

⁵³ See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

⁵⁴ *Ex parte Young*, 209 U.S. at 127-29.

⁵⁵ See *id.* at 127.

⁵⁶ See *id.* at 129.

⁵⁷ *Id.* at 130.

acts.⁵⁸ The Attorney General, in turn, disobeyed this injunction, claiming that the court's issuance of the injunction violated the Eleventh Amendment.⁵⁹

The primary issue before the Court was whether the action against the Attorney General, asserting a deprivation of Fourteenth Amendment rights, was actually against the State, and thus in violation of the Eleventh Amendment.⁶⁰ To resolve this issue, the Court considered the relationship between the Eleventh and Fourteenth Amendments. State action raises legal issues under both amendments.⁶¹ However, when a suit is brought against a state, courts must separately consider its validity under each of the amendments.⁶² Specifically, for a valid suit under the Fourteenth Amendment there must be state action; however, if the state itself is performing the state action, then the Eleventh Amendment bars suit against the defendant-state.

The doctrine of *Ex parte Young*, however, relies on a legal fiction when suits are brought against state officials to overcome this paradox.⁶³ This legal fiction allows a court to recognize an official's unconstitutional conduct as state action for purposes of the Fourteenth Amendment, while simultaneously concluding that the action is "not attributable to the State for purposes of the Eleventh [Amend-

⁵⁸ See *id.* at 132.

⁵⁹ See *id.* at 134.

⁶⁰ See *id.* at 149.

⁶¹ The Eleventh Amendment exists to prevent suits against a state. See *supra* text accompanying note 20. The Fourteenth Amendment provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. This Amendment is specifically tailored to the States, and therefore "it can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982).

⁶² See *supra* note 61.

⁶³ In suits against state officials who claim Eleventh Amendment protection because they allegedly acted under state authority, *Young* defeats their defense by employing a legal fiction:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Ex parte Young, 209 U.S. at 159-60.

ment]."⁶⁴ By adopting this legal fiction, the *Young* Court held that the suit against the Attorney General was not against the State.⁶⁵

Following *Young*, courts readily endorsed the legal fiction, and recognized an exception to the Eleventh Amendment whenever a suit challenged the constitutionality of a state official's action.⁶⁶ The federal judiciary has accepted the *Ex parte Young* doctrine as a necessary device to permit the federal courts to vindicate federal rights and to hold state officials responsible to the supreme authority of the United States.⁶⁷

In *Edelman v. Jordan*,⁶⁸ the Court established an important limitation on the *Ex parte Young* doctrine: sovereign immunity will protect state officials sued in their official capacity if the relief sought is retroactive.⁶⁹ In *Edelman*, the plaintiff sought injunctive relief against various state public-aid program officials for administering their programs in violation of federal regulations.⁷⁰ The district court, relying on *Young*, issued an injunction that required the officials to adhere to the federal regulations and, more importantly, to compensate the beneficiaries of the program for past benefits that had wrongfully been withheld.⁷¹ The court of appeals affirmed the decision, but the Supreme Court reversed, disallowing the retroactive payment of funds.⁷² The *Edelman* Court limited *Young*'s application by allowing only prospective, injunctive relief in suits against state officials, on the ground that the Eleventh Amendment prohibits a court from hearing a claim for retroactive relief.⁷³

Edelman's limitation requires a court to focus on the nature of the relief sought in determining whether *Young* allows the court to grant the requested relief.⁷⁴ If the relief is prospective in nature, then the

⁶⁴ Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982).

⁶⁵ *Ex parte Young*, 209 U.S. at 159-60.

⁶⁶ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103 (1984) (stating that a suit against a state official "would not be one against the State since the federal-law allegation would strip the state officer of his official authority").

⁶⁷ See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (holding that *Young* carved out "a necessary exception to Eleventh Amendment immunity"); *Pennhurst*, 465 U.S. at 146 (Stevens, J., dissenting) (noting that the doctrine of *Ex parte Young* "has deep roots in the history of sovereign immunity and makes *Young* reconcilable with the principles of sovereign immunity found in the Eleventh Amendment").

⁶⁸ 415 U.S. 651 (1974).

⁶⁹ *Id.* at 664-78.

⁷⁰ *Id.* at 653.

⁷¹ See *id.* at 656.

⁷² *Id.* at 658-59.

⁷³ *Id.* at 664-78.

⁷⁴ See *Quern v. Jordan*, 440 U.S. 332, 346-47 (1979) (asking whether the relief sought "constitute[s] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury?'").

Eleventh Amendment will not bar the plaintiff's claim.⁷⁵ However, if the relief is "analogous to a retroactive award that requires 'the payment of funds from the state treasury,'" then the court must dismiss the claim.⁷⁶ Such "retroactive" relief is not allowed because of the "real . . . party in interest" determination that the Eleventh Amendment incorporates.⁷⁷ This determination provides that if a remedy comes from the state treasury, then the state, as opposed to the state official, is the real party in interest.⁷⁸ The Eleventh Amendment bars suits where the state is the real party in interest.⁷⁹ However, an *Edelman* analysis entails more than questioning the effect on the state treasury, because even prospective relief may have an "ancillary effect" on funds within the state treasury.⁸⁰ So long as the ancillary effect results from relief that is prospective in nature, the federal court will retain jurisdiction over the suit.⁸¹ Therefore, the ultimate determination under *Edelman* is whether the relief is prospective or retroactive.⁸²

Prior to the Court's decision in *Seminole Tribe v. Florida*, *Edelman* was the only major limitation on the *Ex parte Young* doctrine's protection of federal rights.⁸³ The *Edelman* limitation was consistent with *Young*,⁸⁴ and the Court has noted that it struck the proper balance between "the supremacy of federal law . . . [and] the constitutional

⁷⁵ See *Edelman*, 415 U.S. at 664 ("[T]he relief awarded in *Ex parte Young* was prospective . . .").

⁷⁶ *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 690 (1982).

⁷⁷ *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."). See *supra* notes 44-47 and accompanying text.

⁷⁸ See *Edelman*, 415 U.S. at 663.

⁷⁹ See *supra* notes 44-47 and accompanying text.

⁸⁰ *Edelman*, 415 U.S. at 668 ("[A]n ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young* . . ."); see, e.g., *Quern v. Jordan*, 440 U.S. 332 (1979) (allowing a monetary damage award because the money would be used to provide future benefits, not to compensate for past violations of federal law); *Hutto v. Finney*, 437 U.S. 678, 691 (1978) (treating a court order requiring funds to be paid out of the state treasury as ancillary relief).

⁸¹ See *Edelman*, 415 U.S. at 668.

⁸² See *Quern*, 440 U.S. at 337 ("The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other."); *Edelman*, 415 U.S. at 677 (holding that "a federal court's remedial power . . . is necessarily limited to prospective . . . relief, and may not include a retroactive award" (citation omitted)). However, the *Edelman* distinction will not arise if the suit against the state official "is in fact . . . against a State . . . regardless of whether it seeks damages or injunctive relief." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984).

⁸³ See *Seminole Tribe v. Florida*, 517 U.S. 44, 169-70 (1996) (Souter, J., dissenting); see also *supra* note 16.

⁸⁴ The Court in *Young* awarded only prospective relief. *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

immunity of the States."⁸⁵ Despite the settled state of the *Ex parte Young* doctrine, the *Seminole* Court created a new limitation on the doctrine's application.⁸⁶ To fashion this new limitation, the *Seminole* decision relied on the Court's reasoning in *Schweiker v. Chilicky*⁸⁷ and its progenitors, which provides for a *Bivens* cause of action.⁸⁸

B. The *Bivens* Cause of Action

The Supreme Court established a new cause of action in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁸⁹ to remedy federal officials' unconstitutional acts. This cause of action originated because of the disparate remedial posture in which state and federal officials stood when they committed the same unconstitutional act.⁹⁰ Consider, for example, a search and seizure that officials from both the Federal Bureau of Investigation ("FBI") and state police conducted that violated a person's Fourth Amendment rights. Although the state police officers were subject to liability for their unconstitutional acts under 42 U.S.C. § 1983,⁹¹ the FBI agents, prior to *Bivens*, escaped liability because no federal cause of action applied.⁹² The *Bivens* Court sought to rectify this inequity by providing persons injured by federal officials with the "right to seek damages for the infringement of [their] constitutional rights."⁹³

In *Bivens*, agents of the Federal Bureau of Narcotics arrested Bivens and searched his home.⁹⁴ Bivens sued the federal agents, alleging that "the arrest was 'done unlawfully, unreasonably and contrary to law.'"⁹⁵ Both the district court and court of appeals dismissed Bivens's

⁸⁵ *Pennhurst*, 465 U.S. at 105.

⁸⁶ See *infra* notes 160-73 and accompanying text.

⁸⁷ 487 U.S. 412 (1988); see *infra* notes 111-20 and accompanying text.

⁸⁸ See *infra* Part I.B.

⁸⁹ 403 U.S. 388 (1971).

⁹⁰ Cf. *Butz v. Economou*, 438 U.S. 478, 500 (1978) ("[T]here is no basis for according to federal officials a higher degree of immunity from liability . . . than is accorded state officials when sued for the identical violation . . .").

⁹¹ Section 1983 provides a cause of action when someone acting under the color of state law deprives persons of rights, privileges, or immunities that the Constitution and federal laws provide. 42 U.S.C. § 1983 (1994). In this example, the state police officers, as their title indicates, perform the search and seizure under the authority that state law grants them. Thus, the aggrieved individual may sue the state police officers under § 1983.

⁹² Federal officials are not subject to § 1983 because their authority does not arise under state law. See Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 337 (1989). But see CHEMERINSKY, *supra* note 51, § 9.1, at 523 n.1 (reporting that "[f]ederal officials may be sued under § 1983 only if they act in concert with state or local officers to violate the Constitution or laws of the United States." (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967))).

⁹³ Rosen, *supra* note 92, at 337.

⁹⁴ *Bivens*, 403 U.S. at 389.

⁹⁵ *Id.* & n.1.

suit for failing to state a federal cause of action, but the Supreme Court reversed,⁹⁶ thereby creating a cause of action for damages.⁹⁷

The *Bivens* Court established a new cause of action against federal officials that provides a remedy of monetary damages.⁹⁸ The Court held that the petitioner was entitled to monetary damages for the unconstitutional acts of the federal agents: "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."⁹⁹ Even though federal courts can award any relief in *Bivens* actions, courts consider monetary damages the proper remedy.¹⁰⁰

In addition to the need to compensate victims, some commentators believe that the monetary awards in *Bivens* actions also have the advantage of deterring federal officials from violating federal law.¹⁰¹ The injured party may recover damages from the actual agents in their personal capacity, but not from the federal government.¹⁰² The federal government stands behind the shield of sovereign immunity, so plaintiffs bringing *Bivens* actions will be severely limited in the damages they can collect.¹⁰³

Bivens actions pose collection problems for successful plaintiffs; however, many potential *Bivens* plaintiffs face limitations that prevent them from ever bringing suit. For example, *Bivens* actions are not

⁹⁶ *Id.* at 390.

⁹⁷ *See id.* at 397.

⁹⁸ *Bivens* sought monetary damages for the federal agent's alleged violation of his Fourth Amendment liberty interests. *See id.* at 390. Although the Fourth Amendment does not specifically provide monetary damages for violations of its provisions, courts can fashion any relief necessary to remedy unconstitutional behavior. *See id.* at 395-97.

⁹⁹ *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

¹⁰⁰ *See id.* at 409-10 (Harlan, J., concurring).

[S]ome form of damages is the only possible remedy for someone in *Bivens*' alleged position. It will be a rare case indeed in which an individual in *Bivens*' position will be able to obviate the harm by securing injunctive relief from any court For people in *Bivens*' shoes, it is damages or nothing.

Id. (Harlan, J., concurring).

¹⁰¹ *See* W. Mark Smith, "Damages or Nothing"—The Efficacy of the *Bivens*-Type Remedy, 64 CORNELL L. REV. 667, 668 n.8 (1979).

¹⁰² *See* Rosen, *supra* note 92, at 341 ("Courts . . . look to the Park Service policeman, the INS official, or the FBI agent to be financially responsible for the actions each took on behalf of the federal government.").

¹⁰³ If plaintiffs can access only the agent's money, then there is little chance of a substantial recovery. However, if the federal government were liable, there would be no limit on monetary recoveries. *See* Nestor M. Davidson, Note, *Constitutional Mass Torts: Sovereign Immunity and the Human Radiation Experiments*, 96 COLUM. L. REV. 1203, 1225 (1996) ("[A]ny remedy against the United States would . . . create an incentive to reach the deep pockets of the federal government. Federal officials would then essentially have nothing to fear in terms of personal liability. The deterrent effects of *Bivens* would thus be undermined." (footnote omitted)).

available in two situations: when Congress has provided alternative remedies, and when "special factors counselling hesitation" exist.¹⁰⁴ In the first case, courts will refuse to create a *Bivens* remedy for constitutional violations if Congress has created "comprehensive procedural and substantive provisions giving meaningful remedies against the United States" for those particular violations.¹⁰⁵ This restriction applies whenever Congress has provided a comparable alternative remedy.¹⁰⁶

The second limitation, on which the *Seminole* Court relied,¹⁰⁷ requires that courts pay "heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation."¹⁰⁸ Courts have not clearly identified what constitutes these "special factors."¹⁰⁹ Instead, courts have applied the limitation by considering whether Congress or the federal judiciary is the proper source for establishing the relief available to injured plaintiffs.¹¹⁰

The Supreme Court made significant strides toward resolving the ambiguity of the special factors limitation in *Schweiker v. Chilicky*.¹¹¹ In *Schweiker*, three individuals brought suit against federal officials in the Social Security Administration, claiming a violation of procedural due process.¹¹² They alleged that the Social Security Administration had instituted a continuing disability review program that resulted in the wrongful termination of their disability benefits.¹¹³ The plaintiffs attempted to frame their case as a *Bivens* action seeking consequential damages and damages for emotional distress.¹¹⁴ The *Schweiker* Court thus confronted the issue of whether plaintiffs could assert a cause of action for money damages against the federal officials.¹¹⁵

The Court found that *Bivens* remedies are not available "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitu-

¹⁰⁴ *Bush v. Lucas*, 462 U.S. 367, 377-78 (1983); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

¹⁰⁵ *Bush*, 462 U.S. at 368.

¹⁰⁶ See Rosen, *supra* note 92, at 358. The Court has continually emphasized that for this exception to apply, the alternative remedy must be as effective as a *Bivens* remedy. *Bush*, 462 U.S. at 388; *Carlson*, 446 U.S. at 21-22.

¹⁰⁷ *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996).

¹⁰⁸ *Bush*, 462 U.S. at 378.

¹⁰⁹ See Rosen, *supra* note 92, at 359.

¹¹⁰ See, e.g., *Bush*, 462 U.S. at 388-90 (finding a special factor because of Congress's superior position in evaluating the policy questions involved in the area of civil service).

¹¹¹ 487 U.S. 412 (1988).

¹¹² *Id.* at 417-19.

¹¹³ See *id.*

¹¹⁴ See *id.* at 419-20.

¹¹⁵ See Sonya Gidumal, *McCarthy v. Madigan: Exhaustion of Administrative Agency Remedies and Bivens*, 7 ADMIN. L.J. AM. U. 373, 398 (1993).

tional violations that may occur in the course of its administration."¹¹⁶ This finding indicates that Congress's authority in a particular area may be enough to create a special factor regardless of whether Congress has actually created a statutory remedy.¹¹⁷ In *Schweiker*, the Court found that Congress was better able to determine whether a new or additional remedy should be available under the Social Security Act.¹¹⁸ The special factors counselling hesitation inquiry now focuses on the idea that "if the matter is in Congress'[s] domain, a *Bivens* remedy will not be available."¹¹⁹ This holding broadens the application of the special factors restriction, thereby further limiting the availability of *Bivens* actions.¹²⁰

II

RECENT CASES AFFECTING THE *EX PARTE YOUNG* DOCTRINE

Two recent Supreme Court decisions altered the *Ex parte Young* doctrine. In *Seminole Tribe v. Florida*, the Court adopted its earlier interpretation in *Schweiker* of special factors counselling hesitation, and relying on the reasoning behind the creation of the *Bivens* cause of action, established a new limitation on the doctrine of *Ex parte Young*.¹²¹ Although the *Seminole* Court addressed this issue only cursorily, the Court expanded this limitation and elaborated on a possible new approach to the *Ex parte Young* doctrine in *Idaho v. Coeur d'Alene Tribe*.¹²²

¹¹⁶ *Schweiker*, 487 U.S. at 423. The two exceptions to *Bivens* suits are not as distinct as they once were. These two exceptions "have been blurred as the Court has found the existence of congressionally created remedies to be a special factor counselling hesitation and preventing the availability of *Bivens* suits." CHEMERINSKY, *supra* note 51, § 9.1.3, at 458.

¹¹⁷ See *Schweiker*, 487 U.S. at 423 ("[T]he concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971))).

¹¹⁸ *Id.* at 426-27. Congress enacted legislation following the disastrous implementation of the continuing disability review program to help rectify the problems with the administration of social security benefits. See *id.* at 415-17. This legislation, however, did not include any provisions that would have granted plaintiffs the sought-after monetary relief. See *id.* at 424-25. Congress's authority over these matters and failure to supply the remedy that the plaintiffs requested prevented the Court from creating a remedy to supplement the legislation. See *id.* at 425-29.

¹¹⁹ Rosen, *supra* note 92, at 361; see Davidson, *supra* note 103, at 1212 (noting that the Court is "increasingly emphasizing deference to legislative and executive prerogatives.").

¹²⁰ See Rosen, *supra* note 92, at 359 ("[T]he special factors defense is broadening, thereby further restricting the right of the victim of a constitutional deprivation to obtain relief.").

¹²¹ *Seminole Tribe v. Florida*, 517 U.S. 44, 73-76 (1996).

¹²² See *infra* Part II.B.

A. *Seminole Tribe v. Florida*

Regulation of Indian gaming raises the perennial issue of federalism that pervades many aspects of Indian affairs.¹²³ Generally, federal authority over Indian affairs stems from the Indian Commerce Clause.¹²⁴ However, states may participate in the management of Indian affairs in two circumstances. First, Congress may explicitly authorize states to extend their jurisdiction over tribal land.¹²⁵ Second, state law will apply implicitly when no superseding federal law exists.¹²⁶

The Supreme Court, in *California v. Cabazon Band of Mission Indians*,¹²⁷ held that states did not have the authority to regulate gaming on tribal reservations.¹²⁸ After the *Cabazon* decision, neither applicable state laws nor clear federal standards existed for regulating the operation of Indian gaming.¹²⁹ As a result, Congress enacted the Indian Gaming Regulatory Act ("IGRA")¹³⁰ "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."¹³¹ To fulfill this policy, IGRA established three classes of gaming activities, created the National Indian Gaming Commission, and furnished a tribal-state negotiating procedure that allows states some control in the regulation of Indian gaming activities.¹³²

IGRA mandates that every state enter into good faith negotiations with the Tribe¹³³ and provides that the state's failure to do so enables a Tribe to bring suit in federal court.¹³⁴ During the early 1990s, the

¹²³ See Gary Sokolow, *The Future of Gambling in Indian Country*, 15 AM. INDIAN L. REV. 151, 163-67 (1991) (examining the competing interests of tribes, states, and the federal government).

¹²⁴ See Sherry M. Thompson, *The Return of the Buffalo: An Historical Survey of Reservation Gaming in the United States and Canada*, 11 ARIZ. J. INT'L & COMP. L. 521, 526-27 (1994); Eric D. Jones, Note, *The Indian Gaming Regulatory Act: A Forum for Conflict Among the Plenary Power of Congress, Tribal Sovereignty, and the Eleventh Amendment*, 18 VT. L. REV. 127, 137-38 (1993) (discussing Congress's plenary power over tribal matters, and noting that "[a]s a general principle, state law cannot apply to Indian affairs within tribal lands"). But see *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413-15 (1980) (holding that congressional power over tribes is not absolute).

¹²⁵ See Jones, *supra* note 124, at 138.

¹²⁶ See *id.* at 139.

¹²⁷ 480 U.S. 202 (1987).

¹²⁸ *Id.* at 221-22.

¹²⁹ See Jones, *supra* note 124, at 129, 132.

¹³⁰ 25 U.S.C. §§ 2701-2721 (1994).

¹³¹ *Id.* § 2702(1).

¹³² *Id.* § 2710(d); see Monaghan, *supra* note 3, at 109.

¹³³ 25 U.S.C. § 2710(d)(3).

¹³⁴ The Act provides that:

The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith . . .

Seminole Tribe attempted to negotiate with Florida state officials regarding the conduct of certain gaming activities.¹³⁵ The negotiations, however, were unsuccessful.¹³⁶ As a result, the Tribe brought suit against the State of Florida and its Governor, seeking an order directing the State to enter into negotiations and to form a compact under the terms of IGRA.¹³⁷ The Tribe alleged that the defendants had "failed to respond in good faith to the Tribe's request for compact negotiations and did not conduct those negotiations in good faith."¹³⁸ The State of Florida raised the affirmative defense of sovereign immunity and filed a motion to dismiss on Eleventh Amendment grounds.¹³⁹

The district court denied the State of Florida's motion to dismiss and held that the State could be sued under IGRA.¹⁴⁰ The court found that IGRA abrogated a state's immunity under the Eleventh Amendment, because Congress enacted IGRA pursuant to the Indian Commerce Clause.¹⁴¹

The Eleventh Circuit jointly considered the *Seminole* decision with *Poarch Band of Creek Indians v. Alabama*,¹⁴² two cases that addressed the issue of state sovereign immunity. The court found that Congress did not have the power to abrogate a state's sovereign immunity under IGRA.¹⁴³ The court addressed each of the three exceptions to the Eleventh Amendment¹⁴⁴ and held that none of the exceptions applied.¹⁴⁵ The court initially found that the states had neither explicitly nor implicitly consented to suit.¹⁴⁶ Second, the court found that while Congress clearly expressed its intent to nullify a state's sovereign

Id. § 2710(d)(7)(A)(i) (format altered).

¹³⁵ See *Seminole Tribe v. Florida*, 801 F. Supp. 655, 656 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996).

¹³⁶ See Monaghan, *supra* note 3, at 110-11 (reporting that negotiations broke down "largely over the question of which types of gambling were permitted under Florida state law").

¹³⁷ See *Seminole*, 801 F. Supp. at 656. For a delineation of the IGRA provisions for forming a compact, see *infra* note 168.

¹³⁸ See *Seminole*, 11 F.3d at 1020 (quoting the Tribe's complaint).

¹³⁹ See *Seminole*, 801 F. Supp. at 656 (discussing the State's argument that "Congress does not have the power constitutionally to . . . explicitly provid[e] the Tribe a judicial remedy against the State").

¹⁴⁰ *Id.* at 657-58, 663.

¹⁴¹ *Id.* at 657-58 (holding that "pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate"); see also *supra* note 124 and accompanying text (discussing the Indian Commerce Clause and Congress's power over tribal concerns).

¹⁴² 784 F. Supp. 1549 (S.D. Ala. 1992) (dismissing suit against the Governor of Alabama); 776 F. Supp. 550 (S.D. Ala. 1991) (dismissing suit against the State of Alabama).

¹⁴³ *Seminole*, 11 F.3d at 1023-24.

¹⁴⁴ See *supra* notes 48-50 and accompanying text.

¹⁴⁵ *Seminole*, 11 F.3d at 1022-23.

¹⁴⁶ *Id.* at 1021-23.

immunity in IGRA, Congress did not possess the constitutional power to effectuate the abrogation of that immunity.¹⁴⁷

Finally, the Eleventh Circuit reviewed the doctrine of *Ex parte Young*.¹⁴⁸ The court noted that the doctrine does not apply in two situations, and held that both of those situations were present in the cases before it.¹⁴⁹ First, a plaintiff cannot use the doctrine of *Ex parte Young* to compel discretionary tasks.¹⁵⁰ The court determined that IGRA granted state governors discretion to negotiate with tribes.¹⁵¹ Second, the *Young* exception to sovereign immunity will not apply when the state, rather than the state official, is the real party in interest.¹⁵² With respect to this point, the court held that the state was the real party in interest, because IGRA only imposes duties on a state—not a state's officials.¹⁵³ The Eleventh Circuit reversed the district court's decision in *Seminole* and affirmed the *Poarch* decisions.¹⁵⁴

The Supreme Court granted certiorari to examine two issues: first, whether the Constitution sanctioned a congressional abrogation exception to the Eleventh Amendment's state sovereign immunity notions, and second, whether the state officials were liable under *Young*.¹⁵⁵ The Court first held that the Indian Commerce Clause did not grant Congress the power to authorize suits against a state and overruled the Interstate Commerce Clause as a source for the congressional abrogation decision in *Pennsylvania v. Union Gas*.¹⁵⁶ Second, the Court held that a plaintiff could not use *Young* to enforce IGRA against state officials.¹⁵⁷

1. *Majority Opinion*

The Court did not adopt the Eleventh Circuit's reasoning to foreclose the availability of suit under *Young*. First, the Court ignored the Eleventh Circuit's argument regarding official discretion.¹⁵⁸ Additionally, the Court only discussed the notion of the states as the exclusive party subject to suit under IGRA—the second argument upon

¹⁴⁷ *Id.* at 1023-28.

¹⁴⁸ *Id.* at 1028-29.

¹⁴⁹ The doctrine of *Ex parte Young* will not apply in suits against state officials if the state official is engaging in a discretionary task or if the suit is actually against the state. *See id.* at 1028.

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 1028-29.

¹⁵² *See id.* at 1029; *see also supra* notes 77-79 and accompanying text.

¹⁵³ *Seminole*, 11 F.3d at 1029.

¹⁵⁴ *Id.*

¹⁵⁵ *Seminole Tribe v. Florida*, 517 U.S. 44, 53 (1996).

¹⁵⁶ *Id.* at 60-73. The *Seminole* Court "found that Congress [did] not have authority under the Constitution to make the State suable in federal court under [IGRA]." *Id.* at 75. For a discussion of this portion of the Court's opinion, see articles cited *supra* note 3.

¹⁵⁷ *Seminole*, 517 U.S. 73-76.

¹⁵⁸ *See supra* text accompanying notes 150-51.

which the Eleventh Circuit relied—in a footnote.¹⁵⁹ Neither of these arguments were necessary for the Court to sustain the Governor's immunity from suit.

Instead of following the Eleventh Circuit's approach, the Supreme Court outlined a new inquiry in the *Young* analysis to preempt the doctrine's application.¹⁶⁰ The majority based its rationale for extending sovereign immunity protection to state officials on the existence of a statutory remedial scheme.¹⁶¹ The Court borrowed this novel approach from a series of cases addressing an unrelated legal issue that the *Bivens* cause of action presented.¹⁶²

The Court adopted the approach of *Schweiker v. Chilicky* to establish the new limitation on *Young*.¹⁶³ The *Schweiker* Court held that the existence of a congressionally created remedial scheme precluded a court from creating any additional remedies.¹⁶⁴ The majority acknowledged that the question that the *Schweiker* Court answered differed from the question *Seminole* posed,¹⁶⁵ yet nonetheless chose to apply *Schweiker's* principle in *Seminole*.

The *Seminole* Court determined that the existence of a complete, legislatively-crafted remedial scheme distinguished the case from traditional *Young* cases.¹⁶⁶ IGRA imposes a duty on a state to negotiate in good faith with Indian Tribes,¹⁶⁷ and it also provides an "intricate remedial scheme."¹⁶⁸ The Court found that Congress intended

¹⁵⁹ *Seminole*, 517 U.S. at 75 n.17 (arguing that the duty that IGRA imposes, unlike other federal statutes, applies "exclusively to 'the State[]'"); see *supra* notes 152-53 and accompanying text.

¹⁶⁰ *Seminole*, 517 U.S. 73-76.

¹⁶¹ *Id.* at 73-75.

¹⁶² See *supra* Part I.B.

¹⁶³ *Seminole*, 517 U.S. at 74-75.

¹⁶⁴ *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies.").

¹⁶⁵ *Schweiker* answered the question whether the Court should create a new remedy against federal officials. See *Seminole*, 517 U.S. at 74; *supra* notes 111-20 and accompanying text. However, *Seminole* addressed whether the Eleventh Amendment should bar a suit against a state official. *Seminole*, 517 U.S. at 74.

¹⁶⁶ *Seminole*, 517 U.S. at 73-75.

¹⁶⁷ See 25 U.S.C. § 2710(d)(3) (1994).

¹⁶⁸ See *Seminole*, 517 U.S. at 73-76. IGRA's remedial procedures provide:

(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under [§ 2710(d)(3)] or to conduct such negotiations in good faith . . .

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under [§ 2710(d)(3)(A)].

for IGRA remedies exclusively to enforce the duties that IGRA prescribes.¹⁶⁹ The majority reasoned that allowing suits under *Young* would extend IGRA beyond the boundaries that Congress intended, because *Young* would enable the Tribe to access any prospective relief, not just the relief the statute detailed.¹⁷⁰ The Court deduced that permitting *Young* suits would render the remedial scheme in IGRA "superfluous," because no tribe would "suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Young*."¹⁷¹ The majority found that the limited state liability provided under IGRA's remedial scheme signalled Congress's desire not to impose *Ex parte Young* liability on state officials for violations of the duty to negotiate in good faith.¹⁷² Thus, the Court held that *Young* was not available to the Seminole Tribe and that the Eleventh Amendment barred suit against the Governor.¹⁷³

....
(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. . . .

....
(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact . . . within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.
(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under [§ 2710(d)(3)].

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact . . . , the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State

25 U.S.C. §§ 2710(d)(7)(A)(i)-(B)(vii) (format altered) (footnote omitted).

¹⁶⁹ *Seminole*, 517 U.S. at 74-76. Relying on *Schweiker*, the Court found that Congress's authority constituted a special factor counselling hesitation. See *supra* text accompanying notes 108; *supra* notes 116-19 and accompanying text.

¹⁷⁰ *Seminole*, 517 U.S. at 74-76.

¹⁷¹ *Id.* at 75.

¹⁷² *Id.* at 75-76 ("[T]he fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under [the remedial provisions of IGRA].").

¹⁷³ *Id.* at 76.

2. Souter's Dissent

Justice Souter's dissent responded to the majority's approach to the *Ex parte Young* doctrine.¹⁷⁴ He began by elaborating on both the history and lineage of *Young* as well as the important role it serves today in assuring the supremacy of federal law.¹⁷⁵ He argued that *Young* provides "a sensible way to reconcile the Court's expansive view of immunity expressed in *Hans* with the principles embodied in the Supremacy Clause and Article III."¹⁷⁶

Affirming the importance of the *Ex parte Young* doctrine, Justice Souter expressed a reluctance to alter the doctrine's application or viability.¹⁷⁷ He argued that the doctrine is a necessary element of the United States federal structure of government.¹⁷⁸ He reasoned that if the Court normally required a clear statement by Congress to alter the constitutional balance between the states and the federal government, the Court should also require an equally clear statement to "block the customary application of *Ex parte Young*."¹⁷⁹ Unlike the majority, which held that simply having a comprehensive remedial scheme suffices to indicate a congressional desire to thwart application of *Young*,¹⁸⁰ Justice Souter posited that Congress's cognizance of the laws it enacts renders it capable of altering the law if it so intends.¹⁸¹

Furthermore, the dissent attacked the Court's reliance on *Schweiker's* comprehensive remedial scheme argument. Justice Souter maintained that the *Bivens* issue, embodied in *Schweiker*, differs from the *Young* issue "in every significant respect."¹⁸² First, the two issues are distinguishable on their facts.¹⁸³ The Court in *Schweiker* faced the issue of whether to create a supplemental *Bivens* action against federal officials individually.¹⁸⁴ In contrast, the dissent asserted that *Seminole*

¹⁷⁴ *Id.* at 169-82 (Souter, J., dissenting). Justice Stevens authored a separate dissent, but he did not discuss the majority's decision with respect to the *Ex parte Young* doctrine. *Id.* at 76-100 (Stevens, J., dissenting).

¹⁷⁵ *Id.* at 169-75 (Souter, J., dissenting).

¹⁷⁶ *Id.* at 169-70 (Souter, J., dissenting).

¹⁷⁷ *Id.* at 174-75 (Souter, J., dissenting) (commenting that the *Ex parte Young* doctrine "should not be easily displaced, if indeed it is displaceable at all, for it marks the frontier of the enforceability of federal law against sometimes competing state policies").

¹⁷⁸ *Id.* (Souter, J., dissenting) ("The decision in *Ex parte Young*, and the historic doctrine it embodies, . . . plays a foundational role in American constitutionalism . . . [Young] is nothing short of 'indispensable to the establishment of constitutional government and the rule of law.'" (citation omitted)).

¹⁷⁹ *Id.* (Souter, J., dissenting).

¹⁸⁰ See *supra* notes 161-73 and accompanying text.

¹⁸¹ *Seminole*, 517 U.S. at 174-75 (Souter, J., dissenting) ("[I]t is 'difficult to believe that . . . Congress, taking careful stock of the state of Eleventh Amendment law, decided it would drop coy hints but stop short of making its intention manifest.'" (quoting Dellmuth v. Muth, 491 U.S. 223, 230-31 (1989) (omission in original))).

¹⁸² *Id.* at 176-77 (Souter, J., dissenting).

¹⁸³ See *id.* (Souter, J., dissenting).

¹⁸⁴ See *supra* notes 111-20 and accompanying text.

did not address the need to create a "novel rule" for supplying a remedy.¹⁸⁵ Instead, the dissent claimed that the issue before the Court was purely jurisdictional.¹⁸⁶

Second, Justice Souter discussed the majority's claim that tribes would always bring suit under *Young*, thus rendering the provisions of IGRA superfluous and unnecessary.¹⁸⁷ The dissent, once again, focused on the jurisdictional nature¹⁸⁸ of *Young* claims and dismissed the argument that suits brought under *Young* displace statutory procedures.¹⁸⁹ Justice Souter also argued that *Young* does not necessarily provide a "free-standing remedy" and urged that *Young* is "subject to the restrictions otherwise imposed on federal remedial schemes."¹⁹⁰ He drew an analogy to federal habeas law, which contains statutory remedies and provides evidence that the *Ex parte Young* doctrine's use in habeas proceedings does not circumvent the statutory habeas remedies.¹⁹¹

Finally, the dissent attacked the claim that Congress intended for suits under IGRA to provide a cause of action against a state, but not against state officers.¹⁹² According to Justice Souter, the majority based its argument on a strict reading of the statutory language of IGRA that provided federal jurisdiction when the state failed to enter into the particular negotiations.¹⁹³ The dissent first countered that this claim was grounded on a false presumption that a *Young* suit would displace the procedural remedies of IGRA.¹⁹⁴ Moreover, the dissent noted that "there is nothing incongruous about a duty imposed on a 'State' that Congress intended to be effectuated by an order directed to an appropriate state official."¹⁹⁵ Therefore, any language conferring a duty on a state would equally apply to a state official.

¹⁸⁵ *Seminole*, 517 U.S. at 177 (Souter, J., dissenting).

¹⁸⁶ *Id.* at 175-77 (Souter, J., dissenting). The doctrine of *Ex parte Young* addresses a court's jurisdictional obligation to satisfy the provisions of Article III of the Constitution. *See id.* at 177; *see also* Monaghan, *supra* note 3, at 115 (recognizing that the nature of the *Ex parte Young* doctrine is jurisdictional rather than remedial).

¹⁸⁷ *Seminole*, 517 U.S. at 177-79 (Souter, J., dissenting) (stating that the majority suggests that "*Young* would allow litigants to ignore the 'intricate procedures' of IGRA").

¹⁸⁸ *Id.* (Souter, J., dissenting) (noting that *Young* stands "for a jurisdictional rule by which paramount federal law may be enforced in a federal court by substituting a nonimmune party (the state officer) for an immune one (the State itself)").

¹⁸⁹ *Id.* at 179 (Souter, J., dissenting) ("Congress has just as much authority to regulate suits when jurisdiction depends on *Young* as it has to regulate when *Young* is out of the jurisdictional picture. . . . *Young* does not bar the application of IGRA's procedures.").

¹⁹⁰ *Id.* at 178-79 (Souter, J., dissenting).

¹⁹¹ *Id.* (Souter, J., dissenting).

¹⁹² *Id.* at 179-82 (Souter, J., dissenting).

¹⁹³ *Id.* at 179-80 (Souter, J., dissenting).

¹⁹⁴ *Id.* at 180-81 (Souter, J., dissenting).

¹⁹⁵ *Id.* at 181 (Souter, J., dissenting).

In addition to launching a multifaceted attack on the Court's use of *Schwelker*, Justice Souter discussed the approach that courts should take when faced with an ambiguous statute.¹⁹⁶ He stated that courts should interpret statutes to "avoid constitutional infirmity."¹⁹⁷ He advised that courts should adopt "any reasonable construction of a statute that would eliminate the need to confront a contested constitutional issue."¹⁹⁸ The dissent concluded that adhering to either of these statutory construction rules would enable the Court to adopt the *Young* approach without altering the constitutional underpinnings of the *Ex parte Young* doctrine.¹⁹⁹

B. *Idaho v. Coeur d'Alene Tribe*

The second case in which the Court addressed a limitation on the *Ex parte Young* doctrine also arose in the context of an Indian tribe's suit against a state official.²⁰⁰ The Coeur d'Alene Tribe brought suit in the United States District Court for the District of Idaho, claiming ownership of the "submerged lands and bed of Lake Coeur d'Alene and of various navigable rivers and streams that form part of its water system."²⁰¹ The Tribe named the State of Idaho and several state officials and agencies as defendants. The Tribe sought title to the property and declaratory and injunctive relief to establish the exclusive right of the Tribe to enjoy the land free from state regulation.²⁰²

In the district court, the defendants moved to dismiss the Tribe's suit on Eleventh Amendment grounds. The district court granted the motion with respect to all the claims on the ground that the claims against the State of Idaho and the state agencies could not lie under the Eleventh Amendment.²⁰³ Additionally, the district court determined that the claims against the state officials to quiet title and for declaratory relief "were the functional equivalents of a damages award

¹⁹⁶ *Id.* at 182 (Souter, J., dissenting).

¹⁹⁷ *Id.* (Souter, J., dissenting).

¹⁹⁸ *Id.* (Souter, J., dissenting). The constitutional issues in *Seminole* were "the place of state sovereign immunity in federal question cases and the status of *Union Gas*." *Id.* (Souter, J., dissenting).

¹⁹⁹ *Id.* (Souter, J., dissenting).

²⁰⁰ *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997); see also Matthew Berry, Case Note, *A Treasure Not Worth Salvaging*, 106 YALE L.J. 241 (1996) (discussing the issues that the Court would face in the *Coeur d'Alene* case).

²⁰¹ *Coeur d'Alene Tribe v. Idaho*, 798 F. Supp. 1443 (D. Idaho 1992), *rev'd in part* (claim against state officials) and *aff'd in part* (claim against state and state agencies), 42 F.3d 1244 (9th Cir. 1994), *rev'd* (state officials), 117 S. Ct. 2028 (1997); see Robert H. Freilich et al., *The Return to State Autonomy: The Eleventh Amendment and Other Key Decisions of the U.S. Supreme Court and Lower Courts Affecting State and Local Government 1995-96*, 28 URB. LAW. 563, 604-05 (1996) (discussing the basis of the claim that the Coeur d'Alene Tribe brought).

²⁰² See *Coeur d'Alene*, 117 S. Ct. at 2032.

²⁰³ *Coeur d'Alene*, 798 F. Supp. at 1446-48.

against the State,” and thus the Eleventh Amendment barred them.²⁰⁴ Finally, the court dismissed the injunctive relief claim against the officials because the court found that the state was the rightful owner of the lands and, therefore, the proper party to regulate the lands’ use.²⁰⁵

The Ninth Circuit agreed with the district court that the Eleventh Amendment barred all claims against the state and its agencies.²⁰⁶ However, it found the *Ex parte Young* doctrine capable of preserving the declaratory and injunctive claims made by the Tribe.²⁰⁷ The Ninth Circuit determined that the state had engaged in a continuing violation of federal law because it had interfered with the Tribe’s ownership rights based on an executive order, which a federal statute had ratified, granting title to the Tribe.²⁰⁸ The court remanded the case to the district court for consideration of the claims for declaratory and injunctive relief.²⁰⁹

The Supreme Court granted certiorari to answer the narrow question “whether the Eleventh Amendment bars a federal court from hearing the Tribe’s claim.”²¹⁰ Specifically, the Court confined its inquiry to whether the Tribe could proceed on its claim for declaratory and injunctive relief against the state officials.²¹¹ Although five Justices agreed that the suit against the state officials could not proceed in federal court, no rationale for this conclusion commanded a majority.

1. *Principal Opinion*

Justice Kennedy who wrote the principal opinion, which Justice Rehnquist joined, further limited the applicability of *Young* by expanding on the recent *Seminole* decision. Justice Kennedy revisited the continuing federalism debate and attempted to redraw *Young*’s jurisdictional threshold to “ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law.”²¹² Thus, the principal opinion reaffirms the *Seminole* decision and suggests that the prospective-retroactive distinction that *Edelman v. Jordan*, which may no longer be good

²⁰⁴ *Id.* at 1449.

²⁰⁵ *Id.* at 1452 (deciding the issue regarding injunctive relief against state officials on the merits).

²⁰⁶ *Coeur d’Alene Tribe v. Idaho*, 42 F.3d 1244, 1247 (9th Cir. 1994).

²⁰⁷ *Id.* at 1251-55.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Coeur d’Alene*, 117 S. Ct. at 2032.

²¹¹ *Id.* at 2033.

²¹² *Id.* at 2034.

law, established is an "empty formalism" contrary to the dictates of the Eleventh Amendment.²¹³

Justice Kennedy began by discussing two instances when *Young* is applicable. First, *Young* permits suits "where there is no state forum available to vindicate federal interests."²¹⁴ Kennedy quoted from one of Alexander Hamilton's *Federalist Papers*: "'[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions.'"²¹⁵ The principal opinion also relied on the facts and circumstances of the Court's *Young* decision for support.²¹⁶ However, the opinion stated that in the present suit "Idaho's courts are open to hear the case" and, thus, no other judicial forum was necessary for resolving the dispute.²¹⁷

Second, regardless of the existence of a state forum, *Young* permits indirect suits against states "when the case calls for the interpretation of federal law."²¹⁸ This is the federalism issue on which most of the Court's debate focuses. Kennedy first examined the history of the federal and state judicial systems and acknowledged the adequacy of both fora for resolving federal questions.²¹⁹ Next, he asserted the need for states to control state administrative action and state officials.²²⁰ Based on these two considerations, Justice Kennedy outlined a balancing test that weighs the competing interests of federalism at issue in suits against state officials.²²¹

The *Coeur d'Alene* principal opinion gives new life to the considerations against promoting the supremacy of federal law by focusing its interest in "'accommodat[ing] . . . the constitutional immunity of the States.'"²²² Kennedy stated that the Court has consistently incorporated this balancing approach, which arguably accords a state's interest more weight, into its *Young* decisions.²²³ The opinion concluded that an important consideration of the Court in determining whether

²¹³ *Id.*

²¹⁴ *Id.* at 2035.

²¹⁵ *Id.* (quoting THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rositer ed., 1961)).

²¹⁶ *Id.* at 2035-36 (noting that "the common-law injury framework [employed by] the *Young* Court underscored the inadequacy of state procedures for vindicating the constitutional rights at stake").

²¹⁷ *Id.* at 2036.

²¹⁸ *Id.*

²¹⁹ *Id.* at 2036-37.

²²⁰ *Id.* at 2037.

²²¹ *Id.* at 2037-38. The Court reasoned that the decision in *Seminole* upset the once prevailing *Edelman* distinction of suits seeking prospective injunctive relief and that the determination now "depend[s] upon the particular context." *Id.* at 2038.

²²² *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)).

²²³ *Id.* at 2038-40.

to allow *Young* suits is, and has always been, the impact that the particular suit will have on the State.²²⁴

Moreover, *Coeur d'Alene's* principal opinion relied heavily on the *Seminole* decision. *Seminole* incorporated the special factors counseling hesitation inquiry into the *Young* doctrine. Using this recent change as a departure point, the principal opinion in *Coeur d'Alene* further modified the *Ex parte Young* doctrine: when deciding whether *Young* would allow a suit to go forward, courts should consider the context in which the suit arose.²²⁵ Significantly, the principal opinion acknowledged that it had departed from *Edelman* and altered the *Ex parte Young* doctrine.²²⁶ In defense of this departure, Justice Kennedy argued that "the *Young* fiction is an exercise in line-drawing[, and t]here is no reason why the line cannot be drawn to reflect the real interest of States consistent with the clarity and certainty appropriate to the Eleventh Amendment's jurisdictional inquiry."²²⁷

In *Coeur d'Alene*, Justice Kennedy found that the relief the Tribe sought extended beyond the power that the *Ex parte Young* doctrine accorded the federal courts. His opinion compared the declaratory and injunctive relief that the Tribe requested to a "retroactive levy upon funds in [the State's] treasury,"²²⁸ because the Tribe had asked for the "functional equivalent of [a] quiet title action."²²⁹ Given that the functional equivalent quality of the relief infringes on the State's sovereign immunity to a greater degree than the supremacy of federal law warrants, the principal opinion determined that the balancing test must weigh against a *Young* exception.²³⁰

2. O'Connor's Concurrence

While departing from the approach of the principal opinion, Justice O'Connor, along with Justices Scalia and Thomas, wrote in support of the judgment of the principal opinion.²³¹ However, the concurrence disagreed with the case-by-case balancing approach that the principal opinion articulated.

O'Connor focused on the functional equivalent language of the principal opinion and denied the Tribe's claim for a *Young* exception to the Eleventh Amendment because of the suit's similarity to a quiet

²²⁴ *Id.* at 2038-39 (referencing *Edelman v. Jordan*, *Quern v. Jordan*, and *Miliken v. Bradley*).

²²⁵ *Id.* at 2039.

²²⁶ *Id.* at 2039-40.

²²⁷ *Id.*

²²⁸ *Id.* at 2043.

²²⁹ *Id.* at 2040.

²³⁰ *Id.* at 2040-43.

²³¹ *Id.* at 2043-47 (O'Connor, J., concurring).

title action.²³² However, the concurrence stopped short of instituting a "case-specific analysis" of the context of the suit.²³³ O'Connor reasoned that such an approach "unnecessarily recharacterizes and narrows much of [the Court's] *Young* jurisprudence."²³⁴

The O'Connor concurrence criticized the approach and ultimate conclusion of the principal opinion. Specifically, the concurrence noted that, not only did the principal opinion rely on a paucity of cases, it also misinterpreted those cases.²³⁵ The cases that the principal opinion cited do not indicate the use of a balancing approach.²³⁶ "Rather, [those cases] establish only that a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*."²³⁷

Additionally, the concurrence noted the precariousness of basing a new approach to *Young* cases on a "single citation [to] the Court's opinion last Term in *Seminole Tribe*."²³⁸ While supporting the *Seminole* decision, O'Connor argued that the principal opinion interpreted that decision too broadly.²³⁹ Instead, the concurrence would limit that holding to bar a *Young* suit only where "Congress [has] prescribe[d] a detailed remedial scheme for enforcement of a statutory right."²⁴⁰

The concurrence advocated continued use of the "straightforward inquiry" that the Court articulated in *Edelman*. This approach properly considers all interests, including the importance of state interests, when deciding whether to permit a *Young* exception.²⁴¹ Despite the concurrence's support of the *Edelman* approach, the concurrence joined with the principal opinion in finding that the suit could not go forward.²⁴²

3. Souter's Dissent

Justice Souter wrote on behalf of the dissenting Justices in a sequel to his *Seminole* dissent.²⁴³ Souter argued that the Coeur d'Alene

²³² *Id.* at 2043-45 (O'Connor, J., concurring).

²³³ *Id.* at 2045 (O'Connor, J., concurring).

²³⁴ *Id.* (O'Connor, J., concurring).

²³⁵ *Id.* at 2046-47 (O'Connor, J., concurring) ("[The Court's] case law simply does not support the proposition that federal courts must evaluate the importance of the federal right at stake before permitting an officer's suit to proceed.").

²³⁶ See *supra* notes 223-24 and accompanying text.

²³⁷ *Coeur d'Alene*, 117 S. Ct. 2028, 2046 (O'Connor, J., concurring).

²³⁸ *Id.* at 2047 (O'Connor, J., concurring).

²³⁹ *Id.* (O'Connor, J., concurring).

²⁴⁰ *Id.* (O'Connor, J., concurring).

²⁴¹ See *infra* Part III.A.2.

²⁴² *Id.* at 2047 (O'Connor, J., concurring).

²⁴³ *Id.* at 2047-59 (Souter, J., dissenting). Justices Stevens, Ginsburg, and Breyer joined the dissent.

Tribe's suit fell clearly within the scope of the *Ex parte Young* doctrine and that the Court should have permitted the suit to proceed in a federal forum.²⁴⁴ The dissent further criticized the new approach that the principal opinion offered and protested that the judgment of both the principal and concurring opinions were unwarranted and improper.²⁴⁵

Justice Souter began by discussing the appropriateness of applying the *Ex parte Young* doctrine to the Tribe's claim. He identified the two conditions for bringing suits under *Young*: first, the plaintiffs must assert a violation of federal law; and second, the plaintiffs must seek prospective, injunctive relief.²⁴⁶ He argued that both of the conditions were met in this case.²⁴⁷ First, the Tribe asserted the violation of a federal law, namely, "the Executive Order, later ratified by Congress, . . . [giving the Tribe] beneficial interest . . . in the beds and banks of all navigable water within the reservation, including the submerged land under Lake Coeur d'Alene."²⁴⁸

Second, the Tribe sought to enjoin the State from regulating the use of navigable waters, which is the type of relief that *Young* permits.²⁴⁹ While acknowledging that a grant of such relief would pose significant consequences to the State, Souter pointed out that these consequences would occur whenever *Young* applies.²⁵⁰ His dissent drew an analogy to *Young*, and argued that relief leaving a state "unable to enforce statutory railroad rate regulation," or unable to enforce navigable water regulations, will not prevent the *Young* doctrine from applying.²⁵¹ Ultimately, Justice Souter argued that "[i]f the Tribe were to prove what it claims, it would establish 'precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*.'"²⁵²

Souter also discussed the reasons why the principal and concurring opinions incorrectly held *Young* inapplicable. His dissent noted that these opinions focused on two points. With respect to the plurality's argument that the Tribe's suit is the functional equivalent of a suit quieting title,²⁵³ Souter explained that "an officer suit implicating

²⁴⁴ *Id.* at 2048 (Souter, J., dissenting).

²⁴⁵ *Id.* (Souter, J., dissenting).

²⁴⁶ *Id.* (Souter, J., dissenting).

²⁴⁷ *Id.* (Souter, J., dissenting).

²⁴⁸ *Id.* at 2049 (Souter, J., dissenting).

²⁴⁹ *See id.* at 2050-51 (Souter, J., dissenting) (stating that the "complaint asks for just such relief" as *Young* requires).

²⁵⁰ *Id.* at 2051 (Souter, J., dissenting).

²⁵¹ *Id.* (Souter, J., dissenting).

²⁵² *Id.* at 2052 (Souter, J., dissenting) (quoting *Papasan v. Allain*, 478 U.S. 265, 282 (1986)).

²⁵³ *See id.* (Souter, J., dissenting).

title is no more or less the 'functional equivalent' of an action against the government than any other *Young* suit."²⁵⁴

Second, both the principal and concurring opinions argued in support of the judgment that "more than mere title [to the submerged lands] would be affected if the Tribe were to prevail."²⁵⁵ The principal opinion claimed that granting the Tribe's injunction would adversely affect the "dignity and status" of the State.²⁵⁶ Moreover, both the principal and concurring opinions expressed concern that if the Court infringed on the State's regulatory power, there would be too great an intrusion into state sovereignty.²⁵⁷ Justice Souter conceded that there is a "significant sovereign interest in regulating its submerged lands," but found that a state "has no legitimate sovereign interest in regulating submerged lands located outside state borders."²⁵⁸ Therefore, if the submerged lands are located within the Tribe's land, the Tribe does not impugn a sovereign interest.²⁵⁹ Souter's dissent again looked to the *Young* decision for support²⁶⁰ and determined that a state's interest in regulatory jurisdiction did not provide a sufficient basis for displacing *Young*.²⁶¹

Finally, Justice Souter analyzed several additional arguments that the principal opinion alone offered as reasons for not applying the doctrine of *Ex parte Young*. First, the principal opinion found that the "state officials" complied with state law, and, therefore, a court should consider them as the "state" for purposes of the Eleventh Amendment.²⁶² Such a finding would bar officer suits—including the instant

²⁵⁴ *Id.* at 2053 (Souter, J., dissenting). The dissent made several analogies: States are functionally barred from imposing a railroad rate found unconstitutional when enforced by a state officer; States are functionally barred from withholding welfare benefits when their officers have violated federal law on timely payment; States are functionally barred from locking up prisoners whom their wardens are told to release. There is nothing unique about the consequences of an officer suit involving title

Id. (Souter, J., dissenting).

²⁵⁵ *Id.* (Souter, J., dissenting).

²⁵⁶ *See id.* (Souter, J., dissenting) (quoting the principal opinion).

²⁵⁷ *See id.* at 2053-54 (Souter, J., dissenting). The State's regulatory power will only be disrupted if the State, as opposed to the Tribe, possesses sovereign authority over the disputed lands. *See id.* at 2054 (Souter, J., dissenting).

²⁵⁸ *Id.* (Souter, J., dissenting).

²⁵⁹ *See id.* (Souter, J., dissenting).

²⁶⁰ The dissent looked to the facts of *Young* and argued:

Young was a suit to enjoin [the enforcement of] a state statute regulating railroad rates One would have difficulty imagining a state activity any more central to state sovereignty than such economic regulation A State obliged to choose between power to regulate a lake and lake bed on an Indian reservation and power to regulate economic affairs . . . would not (knowing nothing more) choose the lake.

Id. (Souter, J., dissenting).

²⁶¹ *Id.* (Souter, J., dissenting).

²⁶² *See id.* (Souter, J., dissenting).

case—from federal court. The dissent found that most cases employing the *Ex parte Young* doctrine are against state officers acting in compliance with state law.²⁶³ In fact, the typical claim in such suits is that the state law itself violates federal law.²⁶⁴

A second argument that the principal opinion advanced was that the injunctive relief the Tribe sought was “functionally equivalent to a money judgment and thus would amount to an impermissibly retrospective remedy.”²⁶⁵ In other words, this argument claimed that the remedy the Tribe sought was “intrusive.”²⁶⁶ However, the dissent noted that “every case decided under *Ex parte Young*, including the original,” was necessarily intrusive, and affected the State’s sovereign interests.²⁶⁷

The third argument the principal opinion offered, without the support of the concurrence, was that the federal-question jurisdiction provided under *Young* supplements that which a state forum provides.²⁶⁸ As with the prior arguments that the principal opinion advanced, the dissent succinctly dispensed with this final argument by stating that “[f]ederal question jurisdiction . . . addresses not the adequacy of a state judicial system, but the responsibility of federal courts to vindicate what is supposed to be controlling federal law.”²⁶⁹

III

ANALYSIS

A. The Importance of the *Ex parte Young* Doctrine

Eleventh Amendment jurisprudence is deeply entrenched in the current Supreme Court. Although a complete overhaul of the Court’s Eleventh Amendment jurisprudence may be in order,²⁷⁰ the Court is not in a position to take such drastic action at this time. It is unlikely that the Court will overturn *Hans v. Louisiana* or any of the subsequent cases supporting state sovereign immunity in the near future.²⁷¹ Therefore, the law providing for the protection of federal rights from state intrusion needs to remain at least as it was before *Seminole*. The

²⁶³ *Id.* (Souter, J., dissenting).

²⁶⁴ *See id.* (Souter, J., dissenting) (noting that the Supremacy Clause makes federal law controlling).

²⁶⁵ *Id.* at 2055 (Souter, J., dissenting).

²⁶⁶ *Id.* (Souter, J., dissenting) (quoting principal opinion).

²⁶⁷ *Id.* (Souter, J., dissenting).

²⁶⁸ *See id.* (Souter, J., dissenting).

²⁶⁹ *Id.* (Souter, J., dissenting).

²⁷⁰ *See generally* Jackson, *supra* note 33, at 498 (“The correctness of *Hans* has long been questioned, by scholars and judges alike, as unwarranted by the constitutional text and as unduly restrictive of federal judicial power to vindicate the supremacy of federal law.”).

²⁷¹ *See* Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 968 (1991) (noting that the diversity argument “is unlikely to win enough votes [in the Supreme Court] to succeed in the near future”).

doctrine of *Ex parte Young* must survive in order to enable individuals to assert their federal rights, and the *Edelman v. Jordan* decision reflects the proper approach to that doctrine.

1. *Young Protects Federal Rights*

The *Ex parte Young* doctrine is necessary for the vindication of federal rights in federal courts and for the assured compliance of state officials with the supreme authority of the United States.²⁷² Unless and until the Court overturns *Hans* and returns state sovereign immunity to its proper place within the scheme of the Constitution,²⁷³ the doctrine of *Ex parte Young* must remain and continue to ensure the supremacy of federal law.²⁷⁴

Legal scholars recognize *Young* as the "primary method of limiting the effect of the Eleventh Amendment and of ensuring state compliance with federal law."²⁷⁵ When a state violates the Constitution or a federal statute, the ability to enjoin those state officers responsible for that violation is of the utmost importance. Without *Young's* grant of power, enabling the judiciary to sidestep the current Court's interpretation of the Eleventh Amendment, the authority of the United States to maintain the supremacy and proper operation of its laws would be drastically limited.²⁷⁶

The doctrine of *Ex parte Young* arms individuals with a sword to assert their federal rights.²⁷⁷ Without *Young*, many plaintiffs would lack the ability to present their issues before a federal court.²⁷⁸ If the

²⁷² See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984).

²⁷³ See *supra* notes 42-43 and accompanying text.

²⁷⁴ See Jackson, *supra* note 33, at 510-11 (arguing that the "harshness of the *Hans* immunity rule has long been mitigated by the availability of injunctive relief against state officers to prevent violations of federal law"); see also Low & JEFFRIES, *supra* note 12, at 185 ("The challenge facing the modern Supreme Court has been to accommodate the [conventional view] suggested by *Hans* with the need for some means of enforcing civil rights against states.").

²⁷⁵ CHEMERINSKY, *supra* note 51, § 7.5.1, at 392; see *Seminole Tribe v. Florida*, 517 U.S. 44, 169-71 (1996) (Souter, J., dissenting) ("*Young* provided, as it does today, a sensible way to reconcile the Court's expansive view of immunity expressed in *Hans* with the principles embodied in the Supremacy Clause and Article III."); WRIGHT, *supra* note 51, § 48, at 312 (*Young* "seems indispensable to the establishment of constitutional government and the rule of law."). But see Currie, *supra* note 7, at 547 (disagreeing with the claim that *Young* is a necessary corollary of *Hans*).

²⁷⁶ See JACOBS, *supra* note 1, at 153 (describing an objection to state sovereign immunity because such immunity "frustrates the performance of one of the most essential [federal] government functions, the dispensation of justice according to law").

²⁷⁷ See *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) ("[*Young*] has permitted the Civil War amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.").

²⁷⁸ See Jackson, *supra* note 33, at 511 ("Availability of [the *Ex parte Young* doctrine] has long fulfilled the function of assuring that, for violations of rights, there is some remedy available, even if not a perfect remedy or a remedy that is in fact available to all who are injured.").

Young decision had not provided an exception for suits against state officers, the only way to test the constitutionality of a statute would be to violate the statute and to raise the unconstitutionality of the statute as a defense to any subsequent prosecution for that violation. Similarly, without *Young*, other individuals perversely would be forced to depend on a state bringing a prosecution against them to have the opportunity to appear in federal court and challenge the state's practices. Therefore, *Young* provides a necessary outlet for individuals whose rights a state or state official has harmed or violated.

However, the courts balance individuals' federal rights with the competing issue of state sovereign immunity.²⁷⁹ The Eleventh Amendment provides a shield to protect states from suit.²⁸⁰ The courts have attempted to rationalize the protection afforded to the states on historical, political, and conceptual grounds, but these bases do not yield an adequate explanation of state immunity.²⁸¹ The current conception is that lawsuits should not encumber states as sovereigns.²⁸² Although there is no complete justification for the existence of sovereign immunity, it continues to survive as a valid defense to suits against the State.

Eleventh Amendment jurisprudence currently maintains two competing protections—the Eleventh Amendment itself provides a shield for states and the *Ex parte Young* doctrine affords a sword for individuals. Without *Young*, however, the sword disappears. The *Ex parte Young* doctrine balances the interests of the individuals wielding swords and the states raising shields to determine when an individual's suit may proceed against a state official despite state sovereign immunity. The Court properly set that balance in *Edelman v. Jordan*.²⁸³

2. *Edelman Properly Balanced Federal Rights Against State Sovereign Immunity*

The *Edelman* Court reconciled the competing interests of federal rights and state sovereign immunity by limiting *Young* suits to those seeking prospective relief.²⁸⁴ As the Court in *Pennhurst* explained, "*Edelman's* distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the

²⁷⁹ See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

²⁸⁰ See *supra* Part I.A.1.

²⁸¹ See JACOBS, *supra* note 1, at 150-55 (analyzing each of the three rationalizations that courts use to support immunity, but concluding that they provide an unsatisfactory explanation of the need and role of state sovereign immunity).

²⁸² See *supra* notes 44-47 and accompanying text.

²⁸³ 415 U.S. 651 (1974).

²⁸⁴ See *supra* notes 68-85 and accompanying text.

States.”²⁸⁵ *Edelman*’s policy of allowing only imposition of prospective relief against state officials enables a plaintiff to effectively sue a state in spite of the Eleventh Amendment.²⁸⁶ However, the prospective quality of the relief allowed in *Young* suits does not require a state to make amends for its prior actions; it merely ensures that states will adhere to federal law in the future.²⁸⁷

The limitation that *Edelman* places on the doctrine of *Ex parte Young* is consistent with the underlying purposes of the doctrine.²⁸⁸ *Young* attempts to restore the supremacy of federal law in cases where a state official violates that law.²⁸⁹ To accomplish *Young*’s purpose, courts actively took steps to end the federal violations and could not simply award compensatory damages and rely on the deterrent effect, hoping that such relief would ensure the supremacy of federal law.²⁹⁰ *Edelman* adheres to the *Young* policy by limiting federal courts’ ability to decide cases against state officials to those suits that seek prospective, injunctive relief to end the violations.²⁹¹ *Edelman* succeeds in fostering the policies underlying *Young*, namely assuring the protection and supremacy of federal rights by requiring courts to engage in a

²⁸⁵ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

²⁸⁶ See *Green v. Mansour*, 474 U.S. 64, 68 (1985) (explaining that prospective “[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law”).

²⁸⁷ See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (asserting that *Young* “carv[ed] out a necessary exception to Eleventh Amendment immunity. . . . [However,] the exception is narrow . . . [and] does not permit judgments against state officers declaring that they violated federal law in the past.” (citations omitted)).

²⁸⁸ See *Pennhurst*, 465 U.S. at 146-47 & n.29 (Stevens, J., dissenting). But see *Harris & Kenny*, *supra* note 40, at 660-62 (criticizing the *Edelman* holding for being “completely contrary to the spirit and rationale of *Ex parte Young*”).

²⁸⁹ See *Papasan v. Allain*, 478 U.S. 265, 277 (1986). The policies underlying the decision in *Young* include the following:

Young’s applicability has been tailored to conform as precisely as possible to those specific situations in which it is “necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation.

Id. at 277-78 (citations omitted).

²⁹⁰ See *Green*, 474 U.S. at 68 (“Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.” (citations omitted)).

²⁹¹ See *supra* notes 74-82 and accompanying text.

line-drawing process to determine whether the relief is prospective or retrospective.²⁹²

B. The Existence of Alternative Remedies Should Not Limit the *Ex parte Young* Doctrine

Suits against state officials for their unconstitutional or illegal actions raise concerns of state sovereign immunity and individual constitutional rights. The judiciary addressed these two concerns with the approach it developed in *Young* and its progeny.²⁹³ This approach provided an accurate and adequate balancing of federalism principles and did not require the Court's additional modification in *Seminole*.

The *Seminole* decision does not follow the policies that the Court announced in previous cases addressing suits against state officials. Moreover, the reasoning of the *Bivens* cause of action, which serves as the Court's only precedent for further limiting the application of the *Ex parte Young* doctrine, does not support the *Seminole* decision.

1. *Contravention of the Policies Underlying Young and the Eleventh Amendment*

No additional limitation of *Young* is necessary to ensure full contemplation of the interests of either the state or the individual. The *Edelman* Court recognized the importance of each of the interests, balanced them, and thereby satisfied each of the interests' underlying policies.²⁹⁴ The Court in *Seminole* rejects *Young*'s longstanding judicial policy by prohibiting relief if a statutory scheme supplies comprehensive remedies.²⁹⁵

²⁹² This Note argues that *Edelman* provides the proper inquiry under *Young*. *Edelman*'s distinction between prospective and retrospective relief assures the future protection of federal rights and that the preservation of federal interests remains the central concern in *Young* suits. See Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1144 (1989) ("It is not that the cost of prospective relief is inconsequential compared with retrospective relief, but that [prospective relief] more sharply and directly connects to the federal interest embodied in the particular federal law upon which the case is based." (emphasis added)). Despite the appropriateness of the *Edelman* inquiry, there are arguably other approaches to control suits under *Young*. See *id.* n.88 (suggesting that the Court fashion a limitation similar to qualified immunity). Several commentators, however, believe that *Edelman* is unnecessary and that its distinction between prospective and retrospective relief is unsatisfactory. See, e.g., Massey, *supra* note 26, at 69-72 (discussing how the *Ex parte Young* doctrine wastes "vast amounts of [a federal court's] energy in determining . . . whether the relief sought is permissible under *Edelman*").

²⁹³ See *supra* Part I.A.2.

²⁹⁴ See *Green*, 474 U.S. at 68-70 (acknowledging that *Young* and *Edelman* established the proper balance between the state sovereignty principles embodied in the Eleventh Amendment and the vindication of federal rights that the constitutional plan envisioned).

²⁹⁵ *Seminole Tribe v. Florida*, 517 U.S. 44, 73-76 (1996).

The *Seminole* Court's sole impetus for this qualification is the presumption that Congress did not intend to permit *Young* suits where it had created statutory remedies.²⁹⁶ This rationale questions Congress's ability to legislate accurately the laws that it creates. If Congress wanted to prohibit suits relying on *Young* when it provided a statutory remedial scheme, it would have promulgated such a limiting provision.²⁹⁷ However, Congress, during the ninety years since the *Young* decision, has never passed legislation restricting federal courts from providing prospective relief under *Young*.²⁹⁸ Yet *Seminole* would lead one to believe that in passing IGRA, Congress, for the first time, manifested a desire to preclude the judicially created *Young* approach for ensuring the supremacy of Congress's own law.²⁹⁹

Edelman limited the *Ex parte Young* doctrine, but that limitation effectively struck the necessary balance between the competing interests at issue.³⁰⁰ The further limitations that *Seminole* imposed do not improve upon or more accurately resolve that balance.³⁰¹ The *Seminole* Court suggested that Congress must state explicitly when a *Young* suit will be permissible.³⁰² However, such an approach to statutory construction does not necessarily reflect congressional intent. The Court presumably has no interest in enforcing federal statutory law beyond Congress's intent, but the *Seminole* approach requires that courts enforce the statutory remedies even when there is no express or implied indication in the statute that such remedy is to be exclusive. Moreover, if *Seminole* requires that Congress specifically include *Young* as a permissible remedy within a statute, virtually none of the current federal statutory rights will be enforceable. The *Seminole* ap-

²⁹⁶ See *supra* notes 166-73 and accompanying text.

²⁹⁷ See *supra* notes 179-81 and accompanying text; see, e.g., Althouse, *supra* note 292, at 1181 ("Congress has enacted many statutes . . . on the assumption that States were immune from suits by individuals," thus making it unreasonable suddenly to interpret the statutes as though the assumption never existed." (quoting *Welch v. Texas Dep't of Highways & Pub. Trans.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring))).

²⁹⁸ See Gibson, *supra* note 10, at 214 ("[A]pparently for the first time, the Court considered congressional intent to be relevant to the question of whether a suit naming a state official as a defendant should be viewed instead as being an action against the state itself and thus barred by the Eleventh Amendment." (footnotes omitted)).

²⁹⁹ See *id.*

³⁰⁰ The jurisdictional bar on anything other than prospective relief enables federal courts to accomplish the goal of ending violations of federal law, while simultaneously protecting the state interest of an undisturbed public fisc. See *supra* notes 74-82 and accompanying text.

³⁰¹ The Court has permitted prospective relief in spite of prohibiting retroactive relief because "the importance of ensuring compliance with federal law in the future simply outweighs compensation for past injuries." Althouse, *supra* note 292, at 1141. *Seminole's* further restriction on prospective relief does not accord with the need to protect the sanctity and vitality of constitutional and statutory federal law. See *supra* Part III.A.1.

³⁰² Congressional silence during the life of the *Ex parte Young* doctrine should be adequate for the Court to determine that the proper balance existed prior to *Seminole*. See *supra* note 298 and accompanying text.

proach does not comport with the duty of the federal courts to ensure the supremacy of federal law.

Based on *Seminole*, the vagaries of the legislature will dictate whether a *Young* suit will lie. If Congress includes a remedial scheme as part of its legislation, state officials can violate federal law with the knowledge that the only remedy available to an aggrieved party will be the remedy that the statute provides. This result directly contravenes the overarching goal of the *Young* doctrine to "permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'"³⁰³ The policies for limiting the doctrine in *Edelman* are sufficiently different from the approach in *Seminole* to persuade against further limitation of the *Ex parte Young* doctrine.

2. *Improper Reliance on Schweiker v. Chilicky*

The differing purposes and premises between the *Ex parte Young* and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* doctrines, which the *Seminole* decision combines, make it difficult to justify the *Seminole* majority's position. *Bivens* deals with implying a cause of action to fill a gap in constitutional protection of individual rights.³⁰⁴ The *Seminole* Court did not fully consider the implications of relying on *Bivens* to create an exception to *Young*. In *Bivens* actions, the judicially created remedy only applies to officials of the federal government.³⁰⁵ A federal court's imposition of sanctions against the federal government does not implicate federalism concerns directly, because there is no effect on state sovereignty.³⁰⁶ By contrast, *Young* allows federal courts to impose sanctions on the states through suits against state officials. If Congress meant to change the *Ex parte Young* doctrine, it would have clearly done so because a change in the doctrine would directly affect the extent to which states are accountable for violations of federal law.³⁰⁷

Moreover, *Bivens* allows monetary damages while *Young* involves only prospective relief.³⁰⁸ These remedies trigger completely differ-

³⁰³ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)); see *supra* notes 170-72 and accompanying text.

³⁰⁴ See Rosen, *supra* note 92, at 338 ("The Supreme Court in *Bivens* felt compelled to fill a void left by Congress in the Civil Rights Statutes." (footnote omitted)).

³⁰⁵ *Bivens* actions only provide relief against federal officials. These actions do not affect states and state officials. See *id.* at 343 (explaining that *Bivens* actions' "primary purpose has always been to redress constitutional deprivations committed by federal officials"). But see JACOBS, *supra* note 1, at 110-11 (recognizing that courts regularly incorporate state official immunity analyses into issues involving federal officials and vice versa).

³⁰⁶ See *supra* note 305.

³⁰⁷ See *supra* notes 296-99 and accompanying text.

³⁰⁸ See *supra* Part I.A.2-B.

ent concerns. The Supreme Court created *Bivens* actions for the "express and sole purpose of providing a damages remedy to the victims of constitutional torts."³⁰⁹ The factual circumstances of *Bivens* cases, as well as the judiciary's intended application of the *Bivens* doctrine, suggest that the remedies that *Bivens* cases award are always retroactive.³¹⁰ Even though *Bivens* relied on the proposition that "federal courts may use any available remedy to make good the wrong done,"³¹¹ in practice, the only feasible remedy to apply in *Bivens* actions is compensatory monetary damages.

Bivens and *Schweiker* only deal with damages remedies, not prospective relief.³¹² In *Schweiker*, the plaintiffs brought a *Bivens* action "seeking consequential damages and damages for emotional distress."³¹³ Moreover, the D.C. Circuit has interpreted *Schweiker* to affect only a court's ability to prescribe damages remedies: "[C]ourts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies."³¹⁴ Furthermore, "the federal judiciary 'has generally exercised extreme caution' in fashioning monetary remedies for violations of individual constitutional rights."³¹⁵ Even if one accepted *Bivens* and *Schweiker* as sufficient precedent for *Seminole*, the *Ex parte Young* doctrine does not impugn the judiciary's exercise of caution in awarding damages. The Court in *Edelman* went beyond merely instructing courts to be cautious in awarding monetary damages by ensuring that the *Ex parte Young* doctrine would not allow such retroactive damages. *Edelman* only permits suits seeking prospective relief.³¹⁶

The remedies that the *Ex parte Young* doctrine allows are purely prospective. The *Bivens* line of cases has left unanswered the question whether "remedial procedures also preempt judicial power to provide equitable relief for constitutional violations."³¹⁷ The existence of a re-

³⁰⁹ Rosen, *supra* note 92, at 343; see also Smith, *supra* note 101, at 668 (maintaining that the Court decided *Bivens* "to compensate victims of unconstitutional official acts. . . . A *Bivens*-type action, therefore, accomplishes its purpose only when a deserving plaintiff recovers damages" (footnotes omitted)).

³¹⁰ See *supra* note 100.

³¹¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

³¹² See *supra* Part I.B.

³¹³ Rosen, *supra* note 92, at 360.

³¹⁴ *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (per curiam).

³¹⁵ Paul R. Owen, *Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights*, 25 N.M. L. REV. 173, 189 (1995).

³¹⁶ See *supra* notes 74-82 and accompanying text.

³¹⁷ Elizabeth A. Wells, Note, *Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?*, 90 MICH. L. REV. 2612, 2613 (1992); see also *id.*

medial scheme, however, should not prevent the supremacy and enforcement of federal law through the use of prospective relief.³¹⁸ The *Bivens* doctrine precludes judicially created relief when there is a statutory remedial scheme available, because that doctrine's goal is to compensate the injured.³¹⁹ On the other hand, under the *Ex parte Young* doctrine, compensation is not a concern—only the sovereignty of the state is a consideration. Therefore, the existence of a remedial scheme does not necessarily further the doctrine's purpose to help the federal government to prevent the continued violation of its laws.³²⁰ Aside from statutory remedies that provide prospective relief,³²¹ the existence of a remedial scheme does not comport with the *Ex parte Young* doctrine's purpose. Therefore, prospective relief must be available without *Seminole's* alternative remedy limitation.

The *Schweiker* Court focused on the special factors limitation of the *Bivens* doctrine, and held that if the issue underlying the *Bivens* action was a matter within Congress's purview—regardless of whether Congress created a specific remedy—a *Bivens* action would not lie.³²² The *Schweiker* Court stated that a *Bivens* action is unavailable if there is any hint that "congressional inaction has not been inadvertent."³²³ If the Court makes the congressional inaction determination on any and all federal statutes providing remedies, many rights now enforceable under *Young* could be in jeopardy.³²⁴

Bivens actions are specifically created to compensate individuals who suffered injuries at the hands of federal officials. The *Bivens* rationale would apply in *Seminole* if the Seminole Tribe sought monetary damages or retroactive relief. However, the Tribe sought an injunction. The *Ex parte Young* doctrine does not deal with compensation; it only seeks to enforce the supremacy of federal law over state officials. In a *Young* situation, *Edelman's* prospective-retroactive distinction

at 2643-44 (observing that *Schweiker* and *Bush* disagree on whether the judiciary is permitted to award injunctive relief in *Bivens* actions).

³¹⁸ *Id.* at 2644 ("The importance of traditional equitable principles to the protection of constitutional guarantees militates against preclusion.").

³¹⁹ See *supra* notes 98-100, 309 and accompanying text.

³²⁰ See *supra* note 67 and accompanying text.

³²¹ Justice Souter alluded to the concurrent operation of certain restrictions that statutory remedies and the *Ex parte Young* doctrine impose. *Seminole Tribe v. Florida*, 517 U.S. 44, 178-79 (Souter, J., dissenting); see *supra* notes 189-91 and accompanying text. This broader interpretation of the way statutory remedies affect the *Ex parte Young* doctrine allows the doctrine to continue protecting federal rights. Under this interpretation, the doctrine limits the judicially awarded remedies so that they will not stray outside of the scope of remedies that Congress explicitly intended in a statute's remedial scheme. For example, in *Seminole*, this approach would have allowed the Tribe to use *Young* only to force the state to adhere to the negotiating procedure that IGRA dictated.

³²² See *supra* notes 116-20 and accompanying text.

³²³ *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

³²⁴ See, e.g., *supra* notes 9-12 and accompanying text.

would prohibit any claim for retroactive relief. The rationale behind the *Bivens* approach does not comport with the *Ex parte Young* doctrine, and the comprehensive remedy inquiry that *Seminole* created by relying on *Schweiker* and *Bivens* is unjustified.

C. The Balancing Test of *Coeur d'Alene* Further Endangers the *Ex parte Young* Doctrine

The principal opinion in *Idaho v. Coeur d'Alene Tribe* veers from established Eleventh Amendment jurisprudence by relying on the *Seminole* decision and by articulating a balancing approach to decide the *Young* jurisdictional question.³²⁵ The principal opinion based its use of a "case-by-case [balancing] approach" on *Seminole's* import of the *Bivens* doctrine.³²⁶ *Seminole* laid the groundwork for a balancing test by forcing the *Young* inquiry to consider special factors counseling hesitation.³²⁷ Such an inquiry unwisely permits a court to look beyond whether the aggrieved party seeks prospective relief and to investigate broadly the various circumstances of the case. *Coeur d'Alene's* reliance on the *Bivens* line of cases further leads the Court astray from the correct inquiry that *Edelman* laid down.

The *Coeur d'Alene* balancing test does not represent the approach that a majority of the Justices adopted.³²⁸ Unfortunately, however, the concurring Justices abandoned the long established strictures of the *Ex parte Young* doctrine to disallow the Tribe's suit.³²⁹ Justice O'Connor's concurrence leaves open the possibility of future consideration of the principal opinion's approach, stating that "[t]he parties have not briefed whether . . . [a new approach to] the *Young* doctrine is warranted."³³⁰ This provides the currently unpersuaded Justices with an opportunity to legitimize the principal opinion's approach the next time a suit against a state official arises. Therefore, it is reasonable to assume that the balancing approach may become the Court's accepted approach when it next decides a similar case.³³¹

³²⁵ *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2038-40 (1997).

³²⁶ *Id.* at 2039 ("*Seminole Tribe's* implicit analogy of *Young* to *Bivens* is instructive.").

³²⁷ *See id.* (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

³²⁸ Only two Justices joined in *Coeur d'Alene's* principal opinion announcing the balancing approach. *Id.* at 2031. Justices O'Connor, Scalia, and Thomas concurred that this test was unnecessary and in conflict with established doctrine. *Id.* at 2046-47 (O'Connor, J., concurring); *see supra* Part II.B.2. But *see infra* Part III.C for the suggestion that the concurring Justices indirectly adopted the balancing test.

³²⁹ *Coeur d'Alene*, 117 S. Ct. at 2047 (O'Connor, J., concurring).

³³⁰ *Id.* at 2045.

³³¹ The Court has drastically altered the *Ex parte Young* doctrine in two cases in two terms, and this trend may continue when the Court has another opportunity to speak to the issue.

The adoption of a balancing approach will emasculate the ability of private citizens to hold state officials responsible for their actions and will erode the rightful supremacy of federal law. States need only allege a credible interest in their policies in order to thwart the applicability of *Young* under a balancing test.³³² As a result, a state legislature may enact laws that, while not blatantly unconstitutional, will allow the state to allege an interest sufficient to override the federal interest. If cause for concern did not exist after *Seminole*, it surely should exist now that several of the Justices in *Coeur d'Alene* have indicated a willingness to eliminate *Edelman's* bright-line test.

The balancing approach of *Coeur d'Alene* stands in stark contrast to the settled approach of *Edelman*, and more importantly, to the underlying principles of *Young*. Even more so than the *Seminole* approach, the balancing approach threatens the supremacy of federal law.³³³ *Coeur d'Alene* permits the existence of a state procedure or policy to block the assertion of a valid federal right.³³⁴ At least in *Seminole*, a federal statutory remedy precluded suit³³⁵ and an attempt to resort to congressional intent existed. *Coeur d'Alene's* expansive balancing approach allows a state to subordinate a congressionally created federal right, regardless of the explicit or implicit intention of Congress. This approach represents an unnecessary and improper abdication of federal power by the Court.

Justice O'Connor's concurrence claims to diverge from the principal decision's balancing approach.³³⁶ However, the two rationales O'Connor provides for disallowing the suit and for distinguishing *Coeur d'Alene* from *Young* necessarily entail a balancing of interests.³³⁷ The principal and concurring opinions' determination that the Tribe may not bring a suit, because it would impinge on the State's power, is

³³² See *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1184-85 (9th Cir. 1997) (inquiring whether the plaintiff sought relief "which could arguably be held to implicate 'state policies or procedures'" (citing *Coeur d'Alene*, 117 S. Ct. at 2034)).

³³³ See *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.").

³³⁴ *Coeur d'Alene*, 117 S. Ct. at 2034.

³³⁵ See *supra* text accompanying notes 166-69.

³³⁶ *Coeur d'Alene*, 117 S. Ct. at 2045 (O'Connor, J., concurring).

³³⁷ The concurrence identified the following two differences between *Coeur d'Alene* and *Young*:

First . . . the suit is the functional equivalent of an action to quiet [the Tribe's] title to the bed of Lake Coeur d'Alene. . . . Second, the Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law. Rather, the Tribe seeks to eliminate altogether the State's regulatory power over the submerged lands at issue—to establish not only that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all.

Id. at 2043-44.

effectively a balancing of federal and state interests.³³⁸ This determination entails considerations that exceed the Court's previously resolved federalism concerns in *Edelman*.³³⁹ If a court asks whether a federal court's ruling in a *Young* case alters a state's power, it is, in actuality, balancing state power against federal power. O'Connor may refuse to call it "a case-specific analysis,"³⁴⁰ but, functionally, that is exactly what the concurrence represents. The balancing approach may undoubtedly soon command a majority of the Court. If that happens, the Court will further ensure *Young's* dissolution.

D. Salvaging the *Ex parte Young* Doctrine

The Court is unlikely to adopt a revisionist approach in the near future.³⁴¹ The Court will undoubtedly continue whittling away at the *Ex parte Young* doctrine and fostering state sovereignty at the expense of individual federal rights.³⁴² However, there are steps that the Court can take to rectify the misdirection of the current Eleventh Amendment jurisprudence. In light of the Court's recent decisions, several interpretations of the *Ex parte Young* doctrine are available that may preserve its sanctity.

This Note examines three approaches for implementing the Court's recent decisions limiting *Young* suits and discusses each interpretation's merits. First, the Court could apply the *Ex parte Young* doctrine to federal constitutional violations, and not to violations of federal statutory law. Second, the Court may limit the holdings of *Seminole* and *Coeur d'Alene* to their facts. Finally, if *Coeur d'Alene* is not confined to its facts for purposes of precedential value, the Court should rely on older *Ex parte Young* doctrine cases for guidance on the proper application of the *Coeur d'Alene* balancing test.

1. *Distinguish Between Constitutional and Statutory Claims*

At its inception, the *Ex parte Young* doctrine emerged to protect the constitutional rights of individuals against state infringement.³⁴³ The Court has extended the reach of the *Ex parte Young* doctrine by affording protection to rights that federal statutory law guarantees.³⁴⁴

³³⁸ See *supra* note 257 and accompanying text.

³³⁹ See *supra* text accompanying note 85.

³⁴⁰ *Coeur d'Alene*, 117 S. Ct. at 2045.

³⁴¹ See *supra* note 271 and accompanying text.

³⁴² Cf. *Coeur d'Alene*, 117 S. Ct. at 2034 ("Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.").

³⁴³ See *supra* text accompanying note 57.

³⁴⁴ See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 33-34; see, e.g., *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 696-97 (1982); *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 698-99 (1949).

One of the common features in the two recent Court decisions, however, is that neither involved a constitutional claim against a state official.³⁴⁵

Seminole and *Coeur d'Alene* may signal the judiciary's unwillingness to continue providing federal court protection of suits not brought under the Constitution.³⁴⁶ While the Court has not necessarily demonstrated an intention to convey such a broad interpretation in this context,³⁴⁷ the Court has expressed a reluctance to create private rights of action or engage in federal common lawmaking.³⁴⁸ The Court has reasoned both that separation of powers concerns mandate that Congress decide when federal rights have remedies and that federalism dictates that the states should handle these issues.³⁴⁹ The Court's reluctance to enforce private rights under federal statutes, however, has not precluded it from recognizing that constitutional claims should exist in some instances.³⁵⁰ Moreover, state officials in lower courts have raised arguments for distinguishing between claims grounded in the Constitution and suits based on a federal question.³⁵¹ Considering the Court's current deference to the states, this further extension of state sovereignty may be close at hand.

³⁴⁵ See *supra* text accompanying notes 134-35, 202.

³⁴⁶ See, e.g., *Flora*, *supra* note 9, at 963 (arguing that in the wake of *Seminole* the Supreme Court should "limit the doctrine of *Ex parte Young* to constitutional violations").

³⁴⁷ Strict adherence to the language of the Court's opinions weighs against this interpretation. The *Seminole* Court found solace when denying that the Commerce Clause provides a source of congressional abrogation because "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) (citing *Ex parte Young*, 209 U.S. 123 (1908)). However, one must remember that the *Seminole* Court swiftly denied this avenue of relief by finding that the *Ex parte Young* doctrine was inapplicable to the Tribe's situation. *Id.* at 73-76.

³⁴⁸ See CHEMERINSKY, *supra* note 51, § 6.3.3.

³⁴⁹ See *id.*

³⁵⁰ The *Bivens* doctrine is the quintessential private right that the Supreme Court granted for constitutional violations that federal officials perpetrated. See *supra* Part I.B. However, the Court has also begun infringing on the applicability of this private right. See *supra* Part I.B.

³⁵¹ See, e.g., *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1184 (9th Cir. 1997) ("Brown argues . . . that Sofamor's claim must fail because *Ex parte Young* applies only to federal constitutional violations, not to violations of federal statutory law."); *Armstrong v. Wilson*, 124 F.3d 1019, 1026-32 (9th Cir. 1997); *Hale v. Belshe*, No. 97-15177, 1997 WL 377113, at *2 (9th Cir. July 3, 1997) ("[T]he state officials maintain that the *Young* exception is limited to constitutional violations and does not extend to permit suits against state officials that turn on statutory claims."); cf. Jackson, *supra* note 33, at 529.

While it can be persuasively argued that courts have a greater role to play in assuring available remedies for vindication of constitutional rights than with respect to statutory rights, this argument is usually made against a backdrop in which Congress has provided some remedy for a statutory right and a private litigant seeks something beyond what Congress has provided.

Id. (footnote omitted).

Ironically, many revisionists would also support the elimination of federal question cases from the *Ex parte Young* doctrine's purview. However, the grounds for the revisionist position are significantly different from those of the Court's federalist majority. Revisionists argue not only that *Young* need not recognize federal question claims, but that the proper interpretation of the Eleventh Amendment should not contemplate the inclusion of federal question cases in its prohibition of suits against states.³⁵² Despite the approach that the revisionists envision, a limitation on the *Ex parte Young* doctrine by the current Court allowing only constitutional claims would not similarly save federal question cases from the Eleventh Amendment.

An interpretation of these cases that only enables a party to use the *Ex parte Young* doctrine when it grounds its claim in a constitutional right severely undermines the significant service that the *Ex parte Young* doctrine provides. Courts, individuals, and even Congress itself, have come to rely on the ability of the federal courts to protect federal rights. This expansive interpretation of *Seminole* and *Coeur d'Alene* leaves individuals without the ability to enter federal courts to seek the protection of many statutory rights and leaves federal courts without the power to ensure the supremacy of federal law.

2. *Limit the Court's Holdings to Their Facts*

The Court's decisions in *Seminole* and *Coeur d'Alene* may foreshadow a narrowing of the *Ex parte Young* doctrine on one of two factual levels. One approach may be to limit these decisions to their respective contexts. Another interpretation is to apply the additional limitations of *Seminole* and *Coeur d'Alene* to all suits that Tribes bring.

The *Seminole* opinion arguably provides a general rule that courts will not grant *Young* jurisdiction in all similar suits if a comprehensive remedial scheme exists.³⁵³ However, a qualifying footnote accompanies this language. One can read footnote seventeen to limit the *Seminole* holding because it states: "[The Court] find[s] only that Congress did not intend [to grant jurisdiction under *Ex parte Young*] in the Indian Gaming Regulatory Act."³⁵⁴

Moreover, the Court focuses on the language of the statute and on whether it is directed at a "state" or a "state official."³⁵⁵ The Court found this distinction significant because it indicated that Congress's intent in IGRA was not to permit suits against state officials.³⁵⁶ How-

³⁵² See Althouse, *supra* note 271, at 973 ("[A]s a minority of the Court has argued, along with numerous commentators, the Eleventh Amendment could be interpreted not to refer to federal question cases."); *supra* notes 39-43 and accompanying text.

³⁵³ *Seminole Tribe v. Florida*, 517 U.S. 44, 74-75 (1996).

³⁵⁴ *Id.* at 75 n.17.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 75-76.

ever, such a distinction is unprecedented.³⁵⁷ The only authority that the Court relies upon to support this theory is *State ex rel Stephan v. Finney*.³⁵⁸ *Finney*, which arose in the Kansas Supreme Court, only addressed whether Kansas's governor had the ability to bind the State in a contract entered into with an Indian Tribe under IGRA.³⁵⁹ This court did not inquire into statutory construction or interpretation, and it only analyzed the policy of the State of Kansas with regard to actions of its officials. Thus, the Supreme Court's *Seminole* and *Coeur d'Alene* holdings rely on a state court decision that is tenuously related—at best—to evidence Congress's intent not to allow a suit under *Young*. The Court's questionable use of this case and its inability to identify additional authority are further support that the holding of *Seminole* is applicable only to suits brought under IGRA.

Similarly, the *Coeur d'Alene* Court held that *Young* was inapplicable in a suit that addressed a state's ability to regulate its navigable waters with respect to submerged lands lying under a lake.³⁶⁰ The *Coeur d'Alene* Court dealt with a unique situation because the issue before the Court arose in a suit between two sovereigns, and could only arise in suits between sovereigns in the future.³⁶¹ The context of this situation permits the conclusion that the *Coeur d'Alene* Court did not intend to alter *Young* jurisprudence in any significant way.³⁶² Moreover, because the balancing approach that the principal opinion introduced does not command a majority, this case arguably imposes no new limitation on the *Ex parte Young* doctrine outside of suits between sovereigns.³⁶³

While the Court extended its evisceration of *Young* beyond the confines of IGRA in *Coeur d'Alene*, the Court still focused its energies on prohibiting a Tribe from bringing suit. The Court may have intended a narrow construction of *Seminole* and *Coeur d'Alene* that would apply only in actions that Tribes brought, but several lower court decisions have already extended the balancing inquiry into non-Tribal

³⁵⁷ See *id.* at 169-82 (Souter, J., dissenting).

³⁵⁸ 836 P.2d 1169 (Kan. 1992).

³⁵⁹ *Id.* at 1170.

³⁶⁰ *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2040-43 (1997); *id.* at 2044 (O'Connor, J., concurring) ("[The Court has] repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State's ability to regulate use of its navigable waters."); *supra* Part II.B.1-2.

³⁶¹ *Coeur d'Alene*, 117 S. Ct. at 2042 (noting that American law in this area is based on "the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty").

³⁶² See Leading Case, *Ex parte Young Doctrine*, 111 HARV. L. REV. 269, 278 (1997) (concluding that the Court "carved a new and very narrow exception to *Young* for submerged lands").

³⁶³ Suits between sovereigns include only those suits that arise between: (1) a state and another state, (2) the United States government and a state, or (3) an Indian tribe and a state.

matters.³⁶⁴ However, a majority of courts have yet to apply this new approach, so the more limited interpretation—that these cases apply only to suits either under IGRA or regarding submerged lands—may be a plausible reading of the law.

Ultimately, the Court's approach in *Seminole* and *Coeur d'Alene* may simply be a signal that the ever-changing federal policy with respect to Indian Tribes is still evolving.³⁶⁵ The language of the *Seminole* opinion and the coincidental facts of these two cases may support such an interpretation. However, it is both unlikely and unreasonable to conclude that the Court's sole intention in *Seminole* and *Coeur d'Alene* was to prohibit generally a Tribe's use of the *Ex parte Young* doctrine.³⁶⁶

3. Clarify the Weight Given to the Interests Considered Under the Coeur d'Alene Balancing Test

Assuming that the balancing test that the principal opinion used in *Coeur d'Alene* becomes the standard approach for determining the applicability of the *Ex parte Young* doctrine,³⁶⁷ another means by which to protect the doctrine from continued curtailment is to accord greater weight to federal interests over competing state interests. The principal opinion has left room for further refinement of the weight given to each of the factors considered in its balancing test. Moreover, this new inquiry will undoubtedly require courts to determine whether the federal or state interests should prevail when both are arguably equal once balanced. This determination would effectively

³⁶⁴ The Ninth Circuit has already extended *Coeur d'Alene* to a situation not involving an Indian Tribe. *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183-85 (9th Cir. 1997) (using principles that *Coeur d'Alene* set forth in a suit that a corporation brought against a state official). *But see* *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 912-14 (8th Cir. 1997) (declining to extend *Coeur d'Alene* in a suit that a tribe brought).

³⁶⁵ See Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 248 (1997) ("Federal [Indian] policy has not been consistent over time.").

³⁶⁶ Assuming the worst, tribes would still have two mechanisms available to assert their rights against states or state officials: (1) suits in state courts and (2) suits in federal courts that the United States brings in its trust capacity. However, each of these means is inadequate. State governments and tribes are too often embroiled in competing interests for state courts to provide the necessary protection. See Wambdi Awanwicake Wastewin, Case Comment, *The Eleventh Amendment and Seminole Tribe: Reinvigorating the Doctrine of State Sovereign Immunity*, 73 N.D. L. REV. 517, 541-42 (1997). Suits that the United States government brings on behalf of tribes also provide insufficient recourse. See Jackson, *supra* note 33, at 540-41 (arguing that the federal government "cannot always be relied on to protect the federal rights of all its people").

³⁶⁷ See *supra* Part III.C. Several courts have mistakenly adopted the principal opinion's balancing test as the proper approach. See *Brown*, 124 F.3d at 1184; *Kish v. Michigan State Bd. of Exam'rs*, No. 97-CV-71342-DT, 1998 WL 155692, at *4-*5 (E.D. Mich. Mar. 31, 1998).

present the same question that the *Edelman* Court answered by articulating a straightforward test.³⁶⁸

Courts can remedy the vague and uncertain approach that a minority of the Court adopted in *Coeur d'Alene* by applying principles that earlier *Young* jurisprudence has articulated. Courts should continue to consider factors such as whether the State is the real party in interest,³⁶⁹ the nature of the relief requested,³⁷⁰ and whether the supreme authority of federal law is implicated.³⁷¹ Courts will need guidance to administer the balancing test, and reliance on prior precedent will provide the necessary instruction to protect both an individual's federal rights and the vitality of the *Ex parte Young* doctrine.

CONCLUSION

The Supreme Court improperly limited the doctrine of *Ex parte Young* with its decisions in *Seminole Tribe* and *Coeur d'Alene*. The Court failed to recognize the distinct and important purposes that the *Ex parte Young* doctrine fulfills by upholding the supremacy of federal rights, and the Court mistakenly relied on precedent that is inapplicable to the framework of the doctrine.

Eleventh Amendment jurisprudence has evolved in an effort to address the varying interests of individuals, states, and the federal government. The *Ex parte Young* doctrine arose out of a need to protect federal rights, a need which emanated from the Court's erroneous decision in *Hans v. Louisiana*. Until the Court overrules or substantively deals with *Hans*, the preservation of the *Ex parte Young* doctrine is necessary to assure that the states do not override the interests of the federal government and individuals.

Unfortunately, the Court has not taken into consideration all of the various interests in its recent decisions. Prior to the *Seminole* decision, *Edelman v. Jordan* provided a balanced approach to the *Ex parte Young* doctrine that addressed each of the three interests. The Court upset that balance with its reliance on the single, arguably unrelated *Schweiker v. Chilicky* decision. The imprudence of the *Seminole* and *Coeur d'Alene* decisions has the potential to erode the doctrine of *Ex parte Young* and to render impotent many federal rights that individuals now enjoy.

³⁶⁸ See *supra* notes 68-82 and accompanying text.

³⁶⁹ See *supra* text accompanying notes 44-47, 77-81.

³⁷⁰ See *supra* text accompanying notes 74-77, 82.

³⁷¹ See *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *supra* Part III.A.1.